Nos. 644 and 693

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

CONTINENTAL OIL COMPANY, GENERAL CRUDE OIL COMPANY, M. H. MARR, SUN OIL COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION,
Respondents.

FEDERAL POWER COMMISSION,
Petitioner,

v.

M. H. MARR, SUN OIL COMPANY, CONTINENTAL OIL COMPANY, GENERAL CRUDE OIL COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION,
Respondents.

ON [redacted] WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF

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ABBREVIATIONS AND ITALICS

The following abbreviations of the names of the parties involved are used generally throughout this brief:

Abbreviation	*Refers to*
Assignors	Respondents Continental, General Crude, Marr and Sun, collectively
Continental	Respondent Continental Oil Company
FPC or Commission	Petitioner Federal Power Commission in No. 693
General Crude	Respondent General Crude Oil Company
Louisiana Gas	Louisiana Gas Corporation
Marr	Respondent M. H. Marr
PSC	Public Service Commission of the State of New York
Sun	Respondent Sun Oil Company
Texas Eastern	Respondent Texas Eastern Transmission Corporation
UGI	Petitioner The United Gas Improvement Company in No. 644

Emphasis by means of *italics* in all quotations herein has been supplied by us, unless otherwise noted.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported in 336 F. 2d 320 and is reprinted at R. 1277-1289.

The opinions and orders of the Commission which were reviewed by the Court of Appeals are as follows: Opinion and Order No. 378, issued February 6, 1963, 29 F.P.C. 249 (R. 962-981); Concurring Opinion of O'Connor, C., 29 F.P.C. 258 (R. 982-984); Order issued April 2, 1963, 29

F.P.C. 692 (R. 1136-1139); Opinion and Order No. 378-A, issued July 12, 1963, 30 F.P.C. 153 (R. 1223-1230); Dissenting Opinion of Woodward, C., 30 F.P.C. 157 (R. 1230-1233).

QUESTIONS PRESENTED

As observed by the Court below: "The principal question to be decided is whether the Commission has jurisdiction over these lease transactions" (336 F. 2d at 323; R. 1282-1283). More specifically, that principal question, as well as further questions presented by the record herein, are stated as follows:

1. Whether FPC has jurisdiction over a conveyance of leasehold interests when such conveyance is made prior to any connection to an interstate pipeline, or any sale or movement in interstate commerce, of the gas produced from the leased properties.

2. Whether a conveyance of leasehold interests in properties located wholly inside the boundaries of a single state constitutes a "sale in interstate commerce of natural gas for resale" within the contemplation of the Natural Gas Act.

3. Whether the Commission is bound by the mandate of a U. S. Court of Appeals which has held that FPC lacks jurisdiction over a conveyance of leasehold interests and has remanded the cause to the Commission for further proceedings not inconsistent with the Court's opinion, where no appeal from the Court of Appeals' judgment was sought or taken and such judgment accordingly became final.

STATUTES INVOLVED

The Natural Gas Act, 52 Stat. 821-833, 15 U.S.C. §§ 717-717w, provides in pertinent part as follows:

> Section 1(b). The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas

for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Sec. 2. When used in this Act, unless the context otherwise requires —

* * *

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

Sec. 19(b). Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court . . . a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. . . . The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification. . . .

STATEMENT OF THE CASE

Summary

Respondent Texas Eastern owns and operates an extensive gas transmission pipeline system running from south Texas to New York City. In the late 1950's, Texas Eastern was in urgent need of a substantial additional supply of natural gas to meet its customers' mounting requirements. To this end, Texas Eastern purchased from the Assignors (respondents Continental, Sun, Marr and General Crude) leasehold interests in lands in southern Louisiana containing a large natural gas deposit known as the Rayne Field.

The conveyance of leasehold interests was concluded on July 27, 1959. In consummating the transaction, the parties relied on the fact that a month previously, on June 23, 1959, the Commission had unanimously and unconditionally approved the whole transaction. At that time, and for a long time thereafter, the Commission disclaimed any jurisdictional authority over the Assignors' sale of their leases. Such disclaimer was based on (a) the fact that the sale of leases was *not* a sale of natural gas, and (b) the established law[1] that the Commission can exercise no jurisdiction over transfers of gas leases. This FPC position was expressly upheld and unanimously confirmed on December 8, 1960, by the Court of Appeals for the District of Columbia Circuit.[2] The case was remanded to the Commission, however, with instructions either to disclaim approval of the price Texas Eastern was paying for the leases or to permit Texas Eastern to justify such price.

The jurisdictional question, which is now the central issue in this case, came to life again three and a half years after the lease sale had become a *fait accompli*. On February 6, 1963, the Commission completely reversed its former position (and also presumed to reverse the D.C. Court of Appeals) by asserting for the first time that it *did* possess

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[1] *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949).
[2] *PSC* v. *FPC*, 287 F. 2d 143.

jurisdiction to regulate and revise the terms of the Assignors' sale of their leasehold interests.

On August 3, 1964, the Court of Appeals for the Fifth Circuit unanimously reversed the orders wherein the Commission had asserted such jurisdiction.[3] That determination is here for review.

The conveyance of Rayne Field leasehold interests was, according to FPC's own findings, negotiated by the parties at arm's length. It was consummated in good faith with the Commission's unconditional approval. The arrangement was *not,* as petitioners now claim, a "device" to evade regulation. The form of the transaction was also its substance — a valid transfer of title to leasehold rights in real property. Congress deliberately withheld from the Commission power to regulate any transaction of this nature; lack of jurisdiction here neither frustrates effective FPC regulation, nor creates any "gap" in the regulatory system envisioned by the Natural Gas Act. Without such jurisdiction, the Commission possesses ample regulatory authority to protect gas consumers.

In this brief we shall substantiate each and all of the statements made in the preceding paragraph. The foundation for this substantiation consists of the facts appearing in the record. A complete and accurate summary of those facts is set forth below.

The abandoned proposal to sell gas

Texas Eastern was confronted with the problem of obtaining a substantial increase in its supply of natural gas in order to satisfy the growing requirements of its customers (R. 6, 8, 15, 358, 552). The Rayne Field, in Acadia Parish, Louisiana, represented the only big,[4] uncommitted gas

[3] *Marr* v. *FPC*, 336 F. 2d 320.

[4] The Rayne Field is a deep, multi-strata gas-condensate field estimated to be capable of producing over one trillion cubic feet of natural gas and some 51 million barrels of hydrocarbon liquids (R. 25, 1186; Ex. M-13, R. 163; Ex. X-2, R. 745).

reserve which was readily accessible to Texas Eastern's trunkline system (R. 6-8, 11, 15, 450, 459, 547, 553; and see map, Ex. X-7, R. 815). All that was needed to enable Texas Eastern to take gas from Rayne was a 22-mile spur line and one compressor station (R. 356, 374-375, 387). Texas Eastern therefore negotiated tentative contracts, dated February 1, 1957, with Continental, Sun, Marr and General Crude, under which Texas Eastern proposed to purchase their Rayne Field gas production for a period of 20 years (Ex. 3-f, R. 99-154).[5]

In the spring of 1957 applications were filed with the Commission by Texas Eastern (for certification of, among other facilities, the short pipeline spur and the compressor station) and by Continental, Sun, Marr and General Crude (for certification of the proposed long-term gas sales) (R. 354-365, 370-371, 450).

Each of the tentative contracts provided that unless all necessary governmental authorizations were obtained by September 1, 1957, either party might cancel the proposed arrangement (R. 102-103). In accordance with this provision, the contracts were later cancelled. Sun, Marr and General Crude withdrew their certificate applications during July 1958 (R. 27, 406-410, 451). Continental filed a withdrawal of its application in January 1959 (R. 425-427).

The long-term gas purchase contracts accordingly never became effective; no gas was ever sold or delivered thereunder.[6]

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[5] Continental, Sun, Marr and General Crude together held some 150 separate leases, representing approximately 95% of the "working interest" in the Rayne Field (R. 26, 208-325, 1187). (The "working interest" excludes "royalty interests" reserved by landowners when they originally grant mineral leases covering their lands.)

[6] As FPC frankly conceded in its July 1960 brief to the D.C. Court of Appeals, "the original program . . . has little bearing on the issues before this Court" (R. 1185). That is still true.

The lease sale agreements

Texas Eastern entered into lengthy negotiations to acquire the Rayne Field leasehold interests owned by Continental, Sun, Marr and General Crude (R. 27, 416). Such negotiations were, as the Commission found, carried on at arm's length and in good faith (R. 462, 1196-1197, 1199, 1209); and on December 4, 1958, such negotiations resulted in the execution by the parties of definitive agreements (R. 27, 46-47, 416).[7] The essential features of these agreements were as follows:

By a "Lease Sale Agreement," the Assignors (Continental, Sun, Marr and General Crude) agreed to sell to Louisiana Gas (an intermediary corporation) their Rayne Field leases in accordance with the provisions of an "Assignment and Conveyance" (R. 27-28, 40-41, 457, 1188; Ex. M-14, R. 171-331). The cash consideration payable to the Assignors totaled $134.4 million,[8] of which $12.4 million was to be paid at the closing and the balance of $122.0 million was to be paid in installments over a period of 16 years (R. 28, 457, 1188). The installment obligations were to be evidenced by promissory notes of Louisiana Gas, secured by a mortgage upon the leasehold interests and other properties being conveyed (R. 28, 457-458, 1188-1189; Ex. M-14, R. 338-348, 349-353; Ex. X-12, R. 820; Ex. X-13, R. 821). The amount payable in installments was not related to the amount of gas to be produced (R. 68-69). The notes provided, however, that in the event of excep-

[7] The voluminous agreements are in evidence as Exhibits M-14, M-20 and M-21 (R. 167-353). Their terms are outlined and explained in the testimony of Texas Eastern's witnesses (R. 27-30, 37-49, 68-70, 78, 84-89), in the Commission's Opinion No. 322 (R. 456-459, 462), and in the Commission's brief to the D.C. Court of Appeals (R. 1188-1190, 1196).

[8] Productive leases are oftimes transferred against payment of large considerations; there was nothing unusual about this aspect of the agreements (R. 70).

tionally high rates of production, payments on the last-maturing notes would be accelerated (R. 351, 574).[9]

It was further provided that when Louisiana Gas acquired the Rayne Field leases and related properties from the Assignors, Louisiana Gas would forthwith convey the same to Texas Eastern, subject, however, to the obligations evidenced by the promissory notes and mortgages; but Texas Eastern assumed no liability for such obligations (R. 28-29, 37-38, 42-43, 458-459, 1189; Ex. M-14, R. 167-171, 333-337).[10]

The "Assignment and Conveyance" provided that Assignors "do by these presents hereby transfer, assign and convey . . . unto Louisiana Gas . . . the oil, gas and mineral leases, the surface leases and option and rights of way described in Exhibit 'A' . . . together with all those wells which are presently completed as gas wells and related lease and well equipment (surface and subsurface), gathering and flow lines, tanks, separators and other equipment and personal property relating thereto . . . and such rights of ingress, egress and easements for such facilities as Grantors have the right to convey" (Ex. M-14, R. 184).

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[9] This, of course, was simply a means of protecting the Assignors against premature devaluation of the collateral (i.e., reserves in the ground) which secured the unpaid balance of the purchase price.

[10] Louisiana Gas was thus used as an intermediary at the insistence of Texas Eastern (R. 47-48, 88). Texas Eastern's reasons for so insisting were twofold: First, Texas Eastern would not have to carry the $122 million of note obligations as a liability on its books or balance sheets (R. 47-48, 84-85, 462); and, secondly, if some catastrophe should destroy the field's productive reservoirs, Texas Eastern could relinquish the leases without being subject to further liability (R. 48-49, 1189). For similar reasons, it is common and customary in the petroleum industry, in transactions such as this one, to transfer productive leaseholds through an intermediary corporation; this method of handling the Rayne Field lease transfers was by no means unique (R. 84, 86-87, 462, 1188, 1196).

The "Assignment and Conveyance" went on to provide (R. 184-194) that the transfer of leases was subject to the following reservations: (a) so-called "deep rights"; i.e., all rights below the deepest zone (13,650 to 13,890 feet below the surface) then known to be productive in the Rayne Field; (b) oil and other minerals, except gas and condensate;[11] and (c) a production payment, payable out of the net proceeds from condensate production after deduction of Rayne Field operating costs; but this production payment was limited: it is to terminate either when total gas production (after extraction of liquids) equals 613.4 billion cubic feet or when only 30 billion cubic feet of recoverable gas reserves remain in the ground (R. 28, 193-194, 458, 1188, 1189-1190).[12]

The reserved production payment was, in effect, part of the consideration running to the Assignors (R. 78, 85); in other words, absent the reserved production payment, Texas Eastern would have had to pay substantially more in cash to acquire the leases. Yet, Texas Eastern clearly benefited from this arrangement, because it relieved Texas Eastern from all Rayne Field operating expenses (R. 80, 83-84, 458, 1190, 1192-1193; Ex. M-14, R. 188-193). Moreover, after the production payment comes to an end, Texas Eastern can anticipate revenues from condensate production, over and above Rayne Field operating expenses, in excess of $9 million (R. 565-566; Ex. X-4, Col. F, R. 751; Ex. X-11, Col. E, R. 819).

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[11] "Condensate" included both "separator liquids" (liquid hydrocarbons which existed in the gaseous phase under original reservoir conditions and which are recovered at the surface by means of mechanical separators) and "natural gas liquids" (liquid hydrocarbons recovered by operation of processing facilities at a natural gasoline extraction plant) (R. 185, 193, 581-585).

[12] Retention of production payments in connection with sales of productive properties is common practice in the petroleum industry (R. 83).

FPC Opinion No. 322

The hearings in Texas Eastern's pending certification proceedings were reopened for receipt of evidence on the lease purchase proposal (R. 412-422, 439-443), and such further hearings were held during March 1959 (R. 19-353). At the outset, counsel for UGI (Petitioner here in No. 644) hailed Texas Eastern's proposed acquisition of Rayne Field leasehold interests "as a constructive step forward in the light of existing circumstances" and stated that "we will express no objection before the Federal Power Commission to the certification of your project as now proposed" (R. 22-23).[13] Although UGI and two other Texas Eastern customers had opposed approval of the original (but later abandoned) gas sale contracts, none of those customers voiced any objection to Texas Eastern's acquisition of the Rayne Field leases or to the issuance of a certificate for Texas Eastern's facilities (R. 455, 1195).

On June 23, 1959, the Commission issued its unanimous Opinion No. 322, granting Texas Eastern an unconditional certificate of public convenience and necessity covering the transportation and compression facilities required to connect the Rayne Field and to accommodate the additional volumes of gas to be taken from that field (21 FPC 860; R. 446-467). In addition to reviewing the prior proceedings and the record evidence, including the lease sale agreements, the Commission found and held in its Opinion No. 322, that FPC had *"no authority"* to certificate the acquisition of Rayne Field leases; that the acquisition "is required by the public convenience and necessity"; that, aside from the price Texas Eastern would pay, "[t]he public will other-

[13] UGI counsel reserved only the right to participate in future Texas Eastern FPC rate proceedings and to question "any increases in your [Texas Eastern's] overall cost of service which might result from additional cost to be incurred" in connection with the lease acquisition (R. 23).

wise benefit from Texas Eastern's acquiring these leases instead of purchasing the gas"; that "the purchase of the leases is *not* a contract to purchase gas"; that Texas Eastern's proposed method of acquisition through an intermediary corporation "is *not* unique in the oil and gas business"; and that the whole lease purchase arrangement had been "arrived at on the basis of arm's-length bargaining" (R. 456, 462).

The Commission accordingly certificated the Rayne Field spur line and compressor station and gave Texas Eastern six months within which to construct those facilities and place them "in actual operation" (R. 466). No stay of this order was ever sought or issued.

Conditions precedent fulfilled

The "Lease Sale Agreement" required that four conditions be met or waived before consummation of the sale of Rayne Field leases: (1) approval by Texas Eastern's attorneys of the Assignors' leasehold titles; (2) issuance by the Internal Revenue Service ("IRS") of a ruling that Assignors' gain from sale of their Rayne Field leasehold interests would be treated as long-term capital gain for income tax purposes; (3) issuance of satisfactory certificates of public convenience and necessity authorizing construction and operation of the Texas Eastern facilities needed to take gas from the Rayne Field and transport it to market areas; and (4) dismissal or withdrawal of the Assignors' applications for certification of the defunct 1957 gas sale contracts (R. 29-30, 457; Ex. M-14, R. 173-176). Each of these conditions was met (R. 1188):

(1) The Texas Eastern attorneys' opinion letter, approving leasehold titles and related matters, was written on February 3, 1959 (Ex. M-11, R. 158-160).

(2) The IRS tax ruling was issued on January 13, 1959 (R. 1176-1181). It reviewed the provisions of all of the lease

sale agreements (R. 1177-1180) and "held that the gain on the sale of the properties being disposed of will be subject to the tax treatment provided by section 1231" — i.e., treatment as long-term capital gain (R. 1181).[14] FPC was fully apprised of this IRS ruling (R. 428-438).

(3) Unconditional certification of Texas Eastern's proposed Rayne Field transportation and compression facilities was granted on June 23, 1959, in FPC Opinion No. 322 (R. 456, 465-466).

(4) Assignors' withdrawals of their applications to sell gas under the cancelled 1957 contracts were expressly permitted by the Commission (R. 406-410, 425-427, 440, 464, 466).

Consummation of the sale of leases

The Rayne Field lease sale was concluded on July 27, 1959 (R. 554-555, 588, 721, 908). The documents transferring or affecting title to the properties were all duly recorded in accordance with Louisiana law (R. 1021, 1022, 1024).[15]

On the day of the closing, a "Management Agreement" was entered into, under which Continental was employed as agent of Louisiana Gas (Texas Eastern) to operate the wells in the Rayne Field (R. 578; Ex. X-19, R. 827-858). The nature of this "Management Agreement" and the reasons for it are set out in its preamble: "Continental . . . has heretofore drilled and operated high-pressure gas wells

[14] In so ruling, IRS necessarily found the proposed transaction to be a *bona fide* sale of realty interests which Assignors had owned for more than six months.

[15] The effect of such recordations was to vest Texas Eastern with absolute title to the leasehold interests and related properties which had been conveyed, subject only to the mortgages thereon. See La. Rev. Stat. 9: 2721; La. Civil Code, Tit. IV, Arts. 2251-2254, 2264-2266; La. Civil Code, Tit. IX, Art. 2725.

completed in the particular leasehold interests covered by the Assignment and Conveyance and has thus supervised the development of the same and is thoroughly familiar with the engineering and operating problems relating thereto . . . Continental has the personnel and facilities necessary to operate such properties safely and efficiently . . . and is willing to operate same *as the managing agent* of Louisiana Gas [i.e., Texas Eastern, which] . . . has had no experience in operating gas properties in the Rayne Field or in the vicinity thereof, and *due to extremely high pressure in the reservoirs and the hazards encountered by an inexperienced Operator,*[16] Louisiana Gas has acquired such leasehold interests . . . with the understanding that it could obtain the experienced and capable management of such properties by Continental" (R. 827-828).[17]

The "Management Agreement" specified that Continental should conduct operations thereunder solely "as managing agent" and "authorized representative" of Louisiana Gas (R. 828). The agreement also provided that it is Louisiana Gas, and not Continental, who has the right to make the really important decisions, such as: whether and where

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[16] The average depth of the productive formations in the Rayne Field varied from 10,700 to 13,700 feet, and reservoir pressures encountered there were abnormally high, ranging in all but one of the horizons from 6,855 to 11,000 pounds per square inch (R. 25, 690-691; Ex. M-13, R. 163; Ex. X-2, R. 745).

[17] Verifying the accuracy of these recitals, Texas Eastern's vice president testified, without contradiction, as follows:

> "We were purchasing a property which represented an important adjunct to our gas supply. The wells from which gas is produced from this property are deep, and the reservoirs in this property are under high pressure. We thought it would be in the public interest to retain as Operator of these wells the one organization in the world that knew the most about them. That was the Continental Oil Company which had supervised the drilling and completion of all the Rayne Field wells. Consequently, we entered into the Management Agreement" (R. 579).

wells shall be drilled or deepened (Art. 1(a), R. 829); whether secondary recovery or recycling operations shall be conducted (Art. 5(a), R. 837-838); and what volume of gas shall be nominated for production each month (Arts. 5(e) and 5(f), R. 839-840).

Subsequent connection of Rayne Field to the Texas Eastern system

In August of 1959 — the month following the closing — the Rayne Field was first connected to Texas Eastern's pipeline system and gas produced by Texas Eastern from its Rayne Field leases began to be transported in interstate commerce (R. 721, 722, 906, 908). The record "is clear that the natural gas under the Rayne Field leases acquired by Texas Eastern, *was not*, at the time of the acquisition, connected with any pipeline transporting natural gas in interstate commerce and, further, the natural gas under the Rayne Field leases acquired by Texas Eastern had not, at the time of the acquisition, been dedicated to any sale in interstate commerce." (R. 885; italics are those of FPC Examiner Frazee, 29 FPC at 262-263).

Review proceedings in the D. C. Court of Appeals

The Public Service Commission of the State of New York (PSC), an intervenor in the FPC proceedings, stood alone in objecting to the lease sale arrangement (R. 455, 1195). Following denial on August 21, 1959, of its application for rehearing (R. 467-477), PSC petitioned for review in the Court of Appeals for the District of Columbia Circuit. Texas Eastern intervened and joined the Commission in opposing PSC's contentions.

As respondent, the Commission filed its brief in the D.C. Court of Appeals under date of July 11, 1960 (R. 1182-1214). In that brief the Commission correctly stated that

this case "centers about the sale of leases" and involves neither "a purchase of gas in place" nor "a contract to sell gas as produced by the assignors"; that "the assignors would wholly alienate their rights to produce natural gas" and "will not produce the gas whose cost is the bone of contention in this case" (R. 1185, 1188). Accordingly, the Commission concluded and repeatedly asserted — again correctly — that the sale and purchase of leases was beyond FPC's jurisdiction (R. 1182-1185, 1200-1202, 1205, 1212). Specifically, the Commission relied on this Court's holding in *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949) that "while even undeveloped leases might be 'facilities,' they are not 'facilities subject to the jurisdiction of the Commission' because Section 1(b) exempts 'production or gathering' from the coverage of the Act" (R. 1201).

The D. C. Court of Appeals' opinion and judgment

The Court of Appeals for the District of Columbia rendered its opinion and judgment on December 8, 1960. *PSC* v. *FPC*, 287 F. 2d 143 (R. 862-868). The Court expressly upheld the Commission's contention that it lacked jurisdiction over the sale of Rayne Field leases:

> "Instead of purchasing gas in the usual manner from the four producer-sellers, Texas Eastern proposed to acquire leasehold interests in the reserves formerly committed to the contracts, for a total price of $134,395,700.00.
>
> "The significance of this change in the form of the transaction, at least from the standpoint of the producer-sellers, is manifest. Sales of natural gas by an independent producer are subject to regulation under Sections 4 and 5 of the Natural Gas Act. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954). *But the Commission has been held to lack jurisdiction over gas leases.* Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949)" (R. 864).

"It is of no importance here that the transactions by which Texas Eastern proposes to acquire the gas will themselves be, by virtue of a change in form, *beyond the regulatory control of the Commission*" (R. 866).

The Court further held, however, that there was insufficient record evidence to support the Commission's apparent general approval of the terms of the lease acquisition arrangement (R. 865). The Court pointed out that "the Commission's warrant to inquire arises by virtue of its responsibility to regulate the purchaser [Texas Eastern], regardless of the status of the seller" (R. 866). Accordingly, the Court remanded the case with directions that the Commission follow one of "two courses": either (1) "expressly disclaim any approval of the price to be paid," or (2) "permit Texas Eastern to establish by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public convenience and necessity" (R. 867). Both at the end of its opinion and in its formal mandate, the D.C. Circuit limited the remand to "proceedings not inconsistent with the opinion of this court" (R. 867, 868).

Proceedings after remand

By order issued on July 14, 1961 (26 F.P.C. 167; R. 869-872), the Commission elected to follow the second of the "two courses" prescribed by the Court of Appeals; i.e., to reopen the proceedings and afford Texas Eastern an opportunity to justify its acquisition costs. Among other things, this July 14th Order defined the issues to be tried in the reopened proceeding and, in so doing, made no reference whatever to any possible assertion of FPC jurisdiction over the sale of leases.

Further hearings were held before FPC Presiding Examiner Frazee during the latter part of 1961. None of the

Assignors was represented at, or participated in, these hearings. Only Texas Eastern offered evidence, none of which had any bearing on the question of the Commission's jurisdiction over the sale of leases.

Texas Eastern's evidence in justification of its lease acquisition costs was massive and for the most part uncontroverted.[18] A summary of this evidence is set out in the Appendix to this Brief and highlights of it appear under Point IV of our argument (*post*, pp. 63-64).

Examiner Frazee rendered his Decision on June 29, 1962, (29 F.P.C. 259; R. 877-902) and therein adhered to the repeatedly established proposition in this case that the Commission has no jurisdiction over the sale of the Rayne Field leases (R. 885-887).[19]

FPC Opinion No. 378

Exceptions to Examiner Frazee's Decision were argued before the Commission on November 29, 1962, by counsel for Texas Eastern, various intervenors, and the FPC Staff (R. 720-743).[20] Counsel for UGI, while urging rejection of

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[18] Selected portions of Texas Eastern's cost justification evidence practically fill volume II of the record (pp. 482-720, 744-861).

[19] The Examiner's treatment of this jurisdictional question is quoted at some length in footnote 6 to the opinion below (R. 1281-1282). After disposing of that question, the Examiner went on to propose a method of regulating Texas Eastern (R. 896-899) — a method which the Commission refused to approve (29 F.P.C. at 256-257; R. 977-978).

[20] None of the Assignors took part in this argument, nor had they any apparent reason for appearing or being heard. Under the D.C. Court of Appeals' mandate, and according to the Commission's Order of July 14, 1961 (R. 869-872), the sole question at issue was whether or not Texas Eastern had established "by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public convenience and necessity" (287 F. 2d at 146; R. 867).

the Examiner's conclusion that FPC lacked jurisdiction over the sale of leases, stated, *inter alia:* "we do not ... sist you assert this jurisdiction. Indeed, we suggest that you do not have to" (R. 724); and later: "we do not believe the Commission needs to assert jurisdiction over the transaction to effectively control the situation with which it is confronted here" (R. 727).[21]

On February 6, 1963, the Commission handed down its Opinion No. 378 (29 F.P.C. 249; R. 962-981), asserting for the first time that it *did* possess jurisdiction over the sale of Rayne Field leases; that Assignors had not actually conveyed interests in real property, but instead had sold a commodity, natural gas, for resale in interstate commerce; and that Assignors were therefore obligated, under the Natural Gas Act, to file with the Commission applications for certificates authorizing such sale, together with "appropriate rate schedules." Opinion No. 378 went on to command Assignors and Texas Eastern to rescind the lease sale they had consummated almost four years earlier and to enter into some unspecified new contractual arrangement, effective retroactively back to the day in August 1959 when Texas Eastern began taking gas from its Rayne Field leases.

FPC Opinion No. 378-A

After Assignors and Texas Eastern had filed applications for rehearing (R. 984-1135), the Commission, on April 2, 1963, issued an order purportedly granting such applications, but effectively denying them (29 F.P.C. 692; R. 1136-1139). Finally on July 12, 1963, the Commission issued its Opinion No. 378-A (30 F.P.C. 153; R. 1223-1230). Therein, FPC reasserted its jurisdiction over the Rayne Field lease

[21] Quotation in this brief of UGI's basic position on this point is not intended to reflect agreement with the method of regulation advocated by UGI.

sale, but postponed, pending judicial review, the requirement that the parties rescind their 1959 sale of leases and enter into a new, retroactive contractual arrangement.[22]

Commissoner Woodward's dissenting opinion.

Commissioner Woodward, who had not participated in Opinion No. 378 (R. 981), dissented from Opinion No. 378-A (30 F.P.C. 157; R. 1230-1233), pointing out succinctly the majority's numerous and grievous errors: (1) "assertion of jurisdictional authority over the sale of leasehold rights in Rayne Field, on the basis of an unsupported vague and obscure dissertation, is a complete reversal of its [FPC's] prior position in these proceedings"; (2) "the Commission commits grave error in attempting to exercise jurisdiction in areas forbidden to it by the Congress and the Supreme Court of the United States. . . . Without question, this is an unlawful assumption of jurisdiction"; (3) "The leasehold sale was not a sale in interstate commerce; it affected only rights and interests in real property located wholly within the State of Louisiana"; (4) the D.C. Circuit's opinion "conclusively settled the jurisdictional question . . . Any other conclusion disparages the Court of Appeals adjudication — this fact is indisputable. If permitted, this Commission's course of action would destroy the rights of parties to court review and render the decisions of the courts meaningless"; (5) "the majority errs in attempting to force the parties herein to revise their contracts . . . there is nothing in the Act which confers such absolute power on the Commission"; and (6) "the Commission's attempt to impart retroactive effect to its findings is totally invalid."

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[22] FPC warned the parties, nevertheless, that unless they eventually comply with its orders, they will be subject to prosecution for violating the Natural Gas Act (R. 1228).

The opinion of the Court below

On review, the Court of Appeals for the Fifth Circuit reversed the Commission's orders of February 6, 1963 (Opinion No. 378), April 2, 1963 (R. 1136-1139) and July 12, 1963 (Opinion No. 378-A), and remanded the cause to the Commission in respect of Texas Eastern, "to determine whether the public convenience and necessity require that the certificate [for Texas Eastern's Rayne Field facilities] be denied, granted, or granted conditionally, in view of the cost of acquisition" (336 F. 2d 320; R. 1277-1291).[23]

The Fifth Circuit's opinion, rendered on August 3, 1964, summarized the relevant facts (R. 1279-1283); discussed at some length this Court's controlling decision in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (R. 1283-1285); disposed of FPC's various arguments (R. 1285-1288); and concluded as follows (R. 1288):

> "We are bound by *Panhandle's* classification of leaseholds as being part of the 'physical activities, facilities and properties' used in production and gathering . . .
>
> "Thus, we conclude that the lease transactions in the instant cases are outside the Commission's jurisdiction. The Commission complains that this will leave a 'gap' in its regulatory powers. Fifteen years ago the Supreme Court in *Panhandle* authorized the Commission to bring this to the attention of Congress, and the Commission has repeatedly done so. If in its wisdom Congress has declined to act, we have neither the power nor the inclination to act in its stead."[24]

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[23] In so remanding the case, the Court "note[d] with regret that this is essentially what the D.C. Circuit told the Commission to do three and one-half years ago" (R. 1289).

[24] The Court further noted that: "Our decision as to jurisdiction makes unnecessary any determination of such questions as whether the D.C. Circuit opinion was binding on the Commission as the 'law of the case'" (R. 1288).

The Fifth Circuit's determination in our case has since been unanimously followed by the Tenth Circuit Court of Appeals. *Pan American Petroleum Corp.* v. *FPC*, 339 F. 2d 694.[25]

The New York Public Service Commission (PSC), which took this case to the D.C. Circuit, and which was an active respondent in the review proceedings before the Fifth Circuit below, did not join in seeking certiorari in this Court.

SUMMARY OF ARGUMENT

I. This Court's landmark decision in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498 (1949), is controlling. The question there presented was, as here, the scope of FPC jurisdiction over transfers of leases covering gas reserves. The holding in *Panhandle* was that such transfers were beyond the coverage of the Natural Gas Act, because gas leases are an essential part of production; and production facilities and producing properties are expressly exempt by Section 1(b) of the Act from FPC regulation.

Since the decision in *Panhandle*, its authority has never been dimmed or doubted by any court. It was cited approvingly by this Court in *Phillips Petroleum Co.* v. *Wisconsin*,

[25] After noting that the facts in the two cases were similar and that the Commission had advanced substantially the same arguments, the Tenth Circuit concluded as follows (339 F. 2d at 696):

> "Our inquiry, then, must determine whether the Pan American transfers were leases within the compulsion of *Panhandle*. We conclude, as did the Fifth Circuit in *Marr*, that the subject conveyances were leases and consequently not within the Commission's jurisdiction under section 7 of the Act but were exempt under section 1(b). We are in complete accord with the views expressed by Judge Rives in his able opinion in *Marr* and find them to be equally applicable to the case at bar."

347 U.S. 672, 678 (1954) for the exact proposition that the Section 1(b) exemption covers producing properties. The *Panhandle* doctrine has been applied and followed in numerous subsequent appellate decisions, including two in the case at bar.

Prior to February 6, 1963, the Commission itself consistently recognized and followed the doctrine of *Panhandle*. In line with this Court's recommendation, the Commission has since 1949 repeatedly asked for amendment of the Act so as to confer on FPC power to regulate natural-gas companies' dispositions of leases, but Congress has steadfastly declined to grant any such added authority. This strongly indicates that the requested authority had never actually been conferred. *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 352 (1941). Great weight must be given an agency's consistent interpretation of the law it administers, especially where the agency has sought to have the law amended but Congress has declined to do so and has thereby acquiesced in the agency's historical interpretation. *United States* v. *Bergh*, 352 U.S. 40, 46-47 (1956).

Apparent are the reasons for this congressional reluctance to endow the Commission with such further authority: it would invite expansion of federal jurisdiction into areas of purely local concern, cloud the title to countless mineral properties, and give FPC regulatory control over all oil and gas production.

Petitioners' attempts to "distinguish" *Panhandle* from the case at bar are all fallacious and futile. Likewise, petitioners' reliance on *Phillips* is misplaced, because that case concerned sales in interstate commerce of the commodity, natural gas, *after* its production, while *Panhandle*, like the case at bar, dealt solely with a conveyance of leasehold interests in realty *before* any gas therefrom had been produced for transportation or sale in interstate commerce.

II. Congress carefully limited the regulatory scope of the Natural Gas Act. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 516 (1957). The Act did not envision federal regulation of the entire natural-gas field to the limit of constitutional power. *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502 (1949). Congress was "meticulous" only to invest the Commission with authority over certain aspects of this field, leaving the residue for state regulation. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1960). To accomplish these ends, Congress specified in Section 1(b) that, so far as sales transactions are concerned, the Act applies only to sales of "natural gas" and only if such sales are made "in interstate commerce." The transaction here under review met neither of these jurisdictional prerequisites.

Within the contemplation of the Act, "natural gas" means a commodity — something capable of being transported and sold in commerce. "Natural gas," as defined in Section 2(5) of the Act, can only mean such a commodity. But natural gas does not become a commodity until it is extracted from the earth and reduced to possession. *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911); *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 586 (1923). When, therefore, the Assignors conveyed their leasehold interests, they did not sell a commodity; they sold nothing but interests in real estate. It follows that the conveyance of leases did not, and could not, constitute a sale of "natural gas."

Neither was the lease conveyance a transaction "in interstate commerce." It is a physical impossibility to sell "in commerce", interstate or otherwise, an interest in land located wholly within the State of Louisiana.

Section 1(b) makes the Act apply solely to transactions *in* interstate commerce; not to any transaction which might *affect* such commerce. The restrictive word "in" greatly

narrows the statute's scope. *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 355 (1941); *Polish National Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 647 (1944). Moreover, Section 1(b) not only affirmatively limits FPC jurisdiction to sales *in* interstate commerce, but specifically excludes from such jurisdiction "any other . . . sale of natural gas."

The lease sale transaction here in question was purely local in character. It involved transfers of title to mineral interests in realty — a type of transaction over which the State has power to, and does, exercise regulatory control. If a transfer of title to leasehold interests could somehow be deemed a transaction in interstate commerce, then the State would be powerless to regulate such transfers. Congress never imagined, let alone intended, that the Natural Gas Act would produce such a grotesque result.

Petitioners attempt in vain to show that the conveyance of leasehold interests was, in effect, a "sale of natural gas in interstate commerce for resale." This whole argument is based upon five selected "features" of the transaction, each and all of which were valid, reasonable and in no wise unusual. When these five "features" are viewed objectively they are seen to be perfectly normal business arrangements which, as the Commission itself found, were worked out by the parties at arm's length and in good faith. Under no circumstances could any one of the features, or all of them together, transform a sale of leasehold interests in real property into a "sale of natural gas in interstate commerce for resale."

III. In *PSC* v. *FPC*, 287 F. 2d 143 (1960), the Court of Appeals for the District of Columbia expressly held that the Commission has no jurisdiction over the Assignors' con-

veyance to Texas Eastern of their Rayne Field leases. The D. C. Circuit remanded the case to the Commission "for further proceedings not inconsistent with the opinion of this court." The opinion directed the Commission to follow one of "two courses": either (1) disclaim approval of the price Texas Eastern was paying for the leases, or (2) reopen the record to permit Texas Eastern to justify its acquisition costs. No review of the D. C. Circuit's judgment was ever sought in this Court. Accordingly, it became "final" as provided in Section 19(b) of the Natural Gas Act. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336-337 (1958).[26] The Commission was thereby forever after precluded from determining the jurisdictional question in a way contrary to the D. C. Circuit's judgment.

The familiar rule of "the law of the case" also governs in this situation.[27] Under this rule, the Commission had no power or authority to deviate from the mandate of the D. C. Circuit and was foreclosed from making a determination different from that of the appellate court. Sound judicial policy dictates adherence to this "law of the case." *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U.S. 335, 340, 341 (1945).

The Commission disobeyed the D. C. Circuit's mandate and made a determination which was diametrically contrary to the holding of the Court of Appeals on the jurisdictional question. This course of action, if permitted, would destroy the rights of the parties to court review of FPC orders and would render meaningless the appellate courts' decisions.

IV. There is no merit to the Commission's contention that the decision of the Court below frustrates "effective"

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[26] That case dealt with Sec. 313(b) of the Federal Power Act, which is identical with Sec. 19(b) of the Natural Gas Act.

[27] Pertinent decisions of this Court and U.S. Courts of Appeal on "the law of the case" are legion. We cite only 15 of them.

FPC regulation and creates a "gap" in the natural gas regulatory system. This contention is fruitless because (a) the Commission *does* have ample authority to regulate effectively pipeline acquisitions of leasehold interests; (b) any additional powers the Commission desires in this area can only be granted by Congress; and (c) the record in the instant case established that the Commission has no real need for additional authority.

The Commission can effectively protect gas consumers by determining the reasonableness of the cost of leases to the pipeline company in a certificate proceeding under Section 7(c) of the Act.[28] There is, accordingly, no prospect of "frustrated" regulation, no regulatory "gap", and no lack of regulatory protection for gas consumers.

Over four years ago, the D. C. Circuit directed the Commission to regulate Texas Eastern's acquisition of the Rayne Field leases by ascertaining whether the cost of such acquisition is consistent with the public convenience and necessity. Last August, the Fifth Circuit issued similar directions. The Commission has refused to obey either appellate mandate — electing, instead, to attempt to usurp forbidden jurisdictional powers. Until FPC has at least tried in good faith to perform its regulatory functions in accordance with the mandates of the two Courts of Appeals, the Commission has no basis for saying that the method of regulation directed by those Courts is "ineffective."

The determinative question here is not what the Commission thinks it should do but what Congress says it can do. *Civil Aeronautics Board* v. *Delta Air Lines*, 367 U.S.

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[28] Two Courts of Appeals have unanimously so ruled in this case. Two of the five members of the Commission were similarly persuaded. This case is here, therefore, because a bare majority of three Commission members tried to expand their powers far beyond permissible statutory limits.

316, 322 (1961). This Court rejected these same arguments about regulatory necessity and jurisdictional "gap" in the *Panhandle* case. Extending a regulatory statute is not warranted simply because experience may disclose it should have been made more comprehensive: "The natural meaning of words cannot be displaced by reference to difficulties in administration." *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 617 (1944). As held by this Court in *Panhandle*, the Commission's only recourse, if it wishes added power to regulate transfers of leases, is to obtain that authority from Congress (337 U.S. at 515). To the same effect, *Border Pipe Line Co.* v. *FPC*, 171 F. 2d 149, 152 (D.C. Cir. 1948).

The extensive, uncontroverted evidence in the record of this case shows that Texas Eastern's acquisition costs were "in line" and in the public interest. Ownership of the Rayne Field leases not only provides Texas Eastern with gas at a lower price than it would have had to pay for gas from any other source, but enables Texas Eastern to avoid gas price escalations and "favored nation" clause triggering and to operate more efficiently and at lower expense.

Texas Eastern's purchase of the Rayne Field leases was a prudent investment and fully consonant with the public convenience and necessity. No additional regulatory authority is needed by the Commission to protect consumers in this instance. The record here furnishes no ground for judicial sanction of the Commission's attempted seizure of jurisdictional powers Congress has deliberately withheld and declined to bestow.

ARGUMENT

I.

The Commission has no jurisdiction over the conveyance of leasehold interests involved in this case

A. This Court's decision in *Panhandle* is controlling

Assertion in this case of jurisdiction over Assignors' sale of their Rayne Field leases represented the Commission's second attempt to expand its regulatory authority into the same forbidden area. The first such attempt was brought to a halt by this Court's landmark decision in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), affirming 172 F. 2d 57. That decision is controlling here.

In *Panhandle*, this Court was concerned with: ". . . a problem involving the scope of the power over the gas reserves of a natural-gas company given to the Federal Power Commission by the Natural Gas Act." (337 U.S. at 499). And this Court concluded that the sale of leaseholds by a natural-gas company was not a sale of natural gas in interstate commerce subject to the jurisdiction of the Commission, but was an "activity related to the production and gathering of natural gas and beyond the coverage of the Act." (at 515).

In arriving at that conclusion, this Court noted that "the Natural Gas Act did not envisage Federal regulation of the entire natural-gas field to the limit of constitutional power" (at 502).[29] This Court then ruled that transfers of lease-

[29] In 1961, some twelve years later, this Court similarly observed, in *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 18, that "Congress, in enacting the Natural Gas Act, did not give the Commission comprehensive powers over every incident of gas production, transportation and sale. Rather, Congress was 'meticulous' only to invest the Commission with authority over certain aspects of this field, leaving the residue for state regulation. *Panhandle Eastern Pipe Line Co.* v. *Public Service Com.*, 332 U.S. 507."

hold interests by natural-gas companies fall within the exemption applicable to "production" in Section 1(b) of the Act (at 503-504). Continuing, this Court said (at 504-505, footnotes omitted):

> "The Commission seeks to distinguish between the activities of production and gathering, such as drilling, spacing wells, or collecting gas, and the facilities such as reserves and gas leases, used therefor and argues that only the former were excluded from the coverage of the Act .... In the face of the unambiguous language of the Act and its legislative background, we cannot ascribe such a narrow meaning to the words, 'the production or gathering of natural gas.' In *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 603, we said that this phrase comprehended the producing properties and gathering facilities of a natural-gas company. *We now adhere to this natural and clear meaning of the words and their obvious expression of congressional intent. Of course leases are an essential part of production.*"

This Court went on to reject the Commission's contentions that it was vested with jurisdiction over transfers of leases by Sections 4, 5 and 7 of the Act, because to accept those arguments "would establish wide control by the Federal Power Commission over the production and gathering of gas"; *"would invite expansion of power into other phases of the forbidden area"*; and "would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor in both Houses of Congress." (at 509).

This Court further noted that, while trading in gas leases was common practice in the industry, the Commission had not previously "claimed the right to regulate dealings in gas acreage," indicating "that the Commission did not believe the power existed" (at 513). "In the light of that

history we should not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include production .... We cannot attribute to Congress the intent to grant such far-reaching powers as implicit in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of federal power" (at 513-514).

During the 16 years since *Panhandle* was decided, its authority has never been dimmed or doubted. On the contrary, *Panhandle* has been consistently cited with approval and followed on the point that FPC lacks jurisdiction over dealings in gas leases and gas acreage.[30] Thus, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), on which petitioners place such heavy reliance, the *Panhandle* case was cited approvingly by this Court for the exact proposition that FPC jurisdiction does not extend to producing properties:

> "In *Federal Power Com.* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 505, we observed that the 'natural and clear meaning' of the phrase 'production or gathering of natural gas' is that it encompasses '*the producing properties* and gathering facilities of a natural-gas company.'" (347 U.S. at 678)

And in the case at bar, the Courts of Appeals for both the D. C. Circuit and the Fifth Circuit have faithfully followed and applied that *Panhandle* doctrine. *PSC* v. *FPC*, 287 F.

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[30] See, e.g., *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678 (1954); *Saturn Oil & Gas Co.* v. *FPC*, 250 F. 2d 61, 68 (10th Cir. 1957), *cert. den.* 355 U.S. 956; *Continental Oil Co.* v. *FPC*, 266 F. 2d 208, 210 (5th Cir. 1959), *cert. den.* 361 U.S. 827; *Public Service Comm.* v. *FPC*, 287 F. 2d 143, 145 (D.C. Cir. 1960); *Pan American Petroleum Co.* v. *FPC*, 339 F. 2d 694, 695, 696 (10th Cir. 1964); *Kansas-Nebraska N. Gas Co.* v. *State Corp. Comm.*, 169 Kan. 722, 222 P. 2d 704, 710 (1950); *Emerald Coal & Coke Co.* v. *Equitable Gas Co.*, 378 Pa. 591, 107 A. 2d 734, 737 (1954).

2d 143, 145 (1960); *Marr v. FPC*, 336 F. 2d 320, 323-324, 326 (1964). More recently, the Tenth Circuit has also been constrained to do the same thing. *Pan American Petroleum Co. v. FPC*, 339 F. 2d 694, 695, 696 (1964).

Up to February 6, 1963, the Commission itself had likewise consistently recognized that *Panhandle* conclusively established FPC's lack of jurisdiction over transfers of leasehold interests in gas reserves.[31] Perhaps the strongest indication of the absence of jurisdiction in this area is to be found in FPC's annual pleas to Congress for amendment of the Natural Gas Act so as to confer upon FPC this very authority. At the conclusion of its opinion in *Panhandle*, this Court told the Commission what it should do if it wished to obtain additional authority respecting lease transfers (337 U.S. at 515-516):

> "If the Commission is of the opinion that it should have the power to control the disposition of leases by natural-gas companies, it is authorized to call the attention of Congress to that fact."

The Commission took this advice to heart and requested amendatory legislation for twelve years in a row; but Congress took no action. As Commissioner Woodward pointed out in his dissent in our case (30 FPC at 157; R. 1231):

> "In its annual reports to Congress for the past twelve years, the Commission has advocated an amend- to Section 7 of the Natural Gas Act which would vest

[31] In its Annual Report to Congress for 1949, the Commission set forth its understanding of *Panhandle* with great clarity (29 FPC Ann. Rep. at 136): "The Supreme Court in affirming the action of both the district court and the Court of Appeals for the Third Circuit *ruled that the disposition of gas reserves and the transfer of gas leases are intimately related to the production and gathering of natural gas, control over which is specifically denied to the Commission by section 1(b) of the act.*" This was also the thesis of the Commission's 1960 brief to the D.C. Court of Appeals in our case (R. 1201).

it with jurisdiction over transfer of leaseholds by natural gas companies. [Citing FPC's Annual Reports for the years 1951 through 1962] In spite of these pleas in each instance the Congress has not acted to confer upon this Commission the power which, clearly, it does not presently possess."[32]

In the same vein, the Court below found it "significant that annually for the past twelve years the Commission has unsuccessfully asked Congress to grant it jurisdiction over the transfer of leaseholds by natural-gas companies" (336 F. 2d at 324; R. 1285).

The fact that FPC sought this added authority from Congress strongly indicates that such requested power had never actually been conferred. *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 352 (1941). Great weight must be given to an agency's consistent interpretation of the law it administers, especially where the agency has sought to have the law amended but Congress has declined to do so and has thereby acquiesced in the agency's historical interpretation. *United States* v. *Bergh*, 352 U.S. 40, 46-47 (1956); *Gas Service Co.* v. *FPC*, 282 F. 2d 496, 499 (D.C. Cir. 1960); *Mississippi Valley Gas Co.* v. *FPC*, 294 F. 2d 588, 592 (5th Cir. 1961).

Apparent are the reasons why Congress has been reluctant to endow the Commission with authority to regulate lease transfers. As this Court cautioned in *Panhandle*, such authority "would establish wide control by the Federal

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[32] It should be noted that the Commission omitted any request for this added authority in its Annual Report for 1963 (See 43 FPC Ann. Rep. at 2-3). Instead, it boasted that it had gained that authority by its ruling in Opinion No. 378 in the case at bar, which ruling was described as "*A major policy decision*" (*Id.* at 16). In its Annual Report for 1964, however, the Commission again asked that Section 7 of the Act be amended so as to nullify the effect of *Panhandle* (44 FPC Ann. Rep. at 7).

Power Commission over the production and gathering of gas" and "would invite expansion of power into other phases of the forbidden area " (337 U.S. at 509).[33]

Opinions No. 378 and No. 378-A in our case show how far the Commission would go — if it could: FPC would dictate, revise or nullify the terms of any conveyance of mineral interests in any property from which natural gas has been, or ever may be, produced and sold in interstate commerce for resale for ultimate public consumption.[34] This would cloud the title to countless mineral properties, whether such titles were based on wills, deeds, leases or other instruments of conveyance; and such clouded titles would be created by edict (or by mere threat) of a federal administrative agency, notwithstanding that real property titles and interests are of peculiar local concern to the respective States. Such clouding of titles (and therefore diminishment of real estate values) could be visited upon

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[33] The Third Circuit Court of Appeals' warning in *Panhandle* was somewhat more graphic: If FPC got its way, a natural gas company "could never sell an outworn truck or an obsolete drilling machine without getting Commission approval. It would, likewise, be compelled to take to the Commission every proposed transfer of a ten acre gas lease in exchange for another, no matter how obviously desirable the transfer might be . . . . In other words, by this process, it seems to us, the Commission will have taken over the area of regulation of facilities for gas production which by express terms of section 1 of the statute were to be excluded from Commission regulation" (172 F. 2d at 61).

[34] Be it recalled that the Rayne Field was not connected to any interstate pipeline, nor was any gas from Rayne transported or sold in interstate commerce, until the month following consummation of the conveyance of leases (R. 450, 721, 722, 885, 906, 908, 1187). Yet, in FPC's view, transportation and sale of natural gas in interstate commerce, *subsequent to conveyance of mineral interests in productive properties*, will suffice to empower the Commission to force retroactive rescission or revision of the terms of such conveyance (R. 978-981, 1228).

unexplored "wildcat" acreage, as well as upon properties whose gas producing potential had been "proven" by exploratory or development drilling.[35]

If the Commission possessed this authority, it could regulate the entire exploration and production end of the petroleum industry; it could deprive landowners of valuable property rights; it could amerce large oil and gas producers and bankrupt small ones.

Beyond cavil, Congress never intended that the Natural Gas Act should endow FPC with such awesome powers or make possible such chaotic and dire consequences. Just as clearly, Congress has steadfastly refused the Commission's repeated pleas for such powers, because to do so would open wide a veritable Pandora's box.

B. There are no valid "distinctions" between *Panhandle* and the case at bar

Petitioners attempt to avoid application of the *Panhandle* doctrine to the instant case by conjuring up various "distinctions." Essentially, these asserted "distinctions" boil down to three: (1) that the gas reserves underlying the leases transferred in *Panhandle* were "undeveloped," whereas the Rayne Field gas reserves were "proven" and "developed"; (2) that the gas to be produced from the lands involved in *Panhandle* was to be transported and sold intrastate, while the Rayne gas was to be transported and sold in interstate commerce; and (3) that the issues decided in

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[35] FPC casually asserts in footnote 13 on page 21 of its brief that it "has had no occasion to decide whether it would have jurisdiction over a sale of leases where anticipated reserves have not been proven or developed"; hence FPC elects to "put that question to one side." In so doing, however, FPC forgets that the leases involved in *Panhandle* were "proven," although not fully "developed" (337 U.S. at 499, 500, 515, 519).

Panhandle differ from those presented here. Each of these three "distinctions" is fallacious and futile.

(1) As to the extent to which the conveyed leases were "proven," "undeveloped" or "developed"

The natural gas reserves involved in *Panhandle* were sufficiently "proven" to permit an informed estimate of their volume, to wit: approximately 700 billion cubic feet, which represented about 12% of the total gas reserves owned by the Panhandle company (337 U.S. at 499, 500).[36] And while the reserves there in question were described as "undeveloped" (337 U.S. at 500, 515), that simply meant they had not been fully drilled. As was pointed out by Mr. Justice Black in his dissenting opinion, the Panhandle company had "already received from its customers *large sums of money* from rates which reflected expenses incurred in maintaining these reserves and *for exploration and development costs* in relation to them" (337 U.S. at 519).

In our case, the Rayne Field gas reserves were likewise "proven" in the sense that their volume could be estimated (R. 25, 163, 745, 1186). Although these reserves had been substantially "developed" by 19 wells drilled on the lands prior to the time of the leasehold conveyance to Texas Eastern, such "development" had by no means been completed: at least 7 more wells were required to be drilled thereafter (R. 485-486, 493-494, 536-537; Ex. X-2, R. 747-748; Ex. X-5, R. 753).

When, therefore, petitioners seek to "distinguish" *Panhandle* by characterizing the reserves there in question as "undeveloped" and those here in question as "proven" and

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[36] Panhandle Eastern Pipe Line Co. held leases on properties capable of yielding a total of some 6 trillion cubic feet of natural gas (172 F. 2d at 58).

"developed," petitioners are simply pasting on deceptive labels.[37]

Petitioners contend that a conveyance of leasehold interests in known gas reserves may occasionally be treated as a "sale of natural gas in interstate commerce for resale". However, they do not (because they cannot) explain how the question of whether or not it is such a sale can conceivably depend upon any such limp criterion as the number of wells that happen to have been drilled on the properties at the time of conveyance. If that were the test, when would a gas deposit become sufficiently "proven" to transform a conveyance of leasehold interests therein into a "sale of natural gas"? When gas is first discovered on adjacent lands? When the discovery well is brought in on the leased acreage? When one, three, or seven development wells are completed? Or when the last dry hole is plugged and abandoned?

(2) As to the lease purchaser's intent and subsequent conduct respecting disposition of gas produced from the properties

Petitioners second "distinction" of *Panhandle* is founded on the false assumption that "the gas to be produced from Panhandle's transferred leases was *in no event* intended for resale 'in interstate commerce,' but was to be consumed within the producing State" (FPC Br. p. 16); that Hugoton (the company which acquired the leases in *Panhandle*) "was

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[37] Throughout their briefs, petitioners similarly seek to create another erroneous impression by labeling the Assignors as "producers." FPC itself decried the use of this misleading device in its 1960 brief to the D.C. Court of Appeals: "We use 'assignors' for the sake of clarity. PSC refers to the companies as 'producers' . . . As regards Rayne field they might fairly be characterized the 'developers'; but they will not produce the gas whose cost is the bone of contention in this case." (R. 1185)

bound by contract to develop the leases and sell the gas therefrom *entirely* in the intrastate market in Kansas" (UGI Br. p. 25).

The actual facts, as related in this Court's *Panhandle* opinion (337 U.S. at 499-501, 507), were these: The interstate pipeline (Panhandle) transferred to Hugoton gas leases on approximately 97,000 acres of land in Kansas. This acreage covered an estimated 700 billion cubic feet of gas reserves, representing 12% of all such reserves owned by Panhandle. Prior to the lease transfer, Panhandle had, in support of three applications for FPC certification of additional pipeline facilities, included this same acreage as part of its (Panhandle's) reserves, and the Commission had issued such certificates upon finding that Panhandle had adequate reserves to warrant its expansion. Moreover, Panhandle had included these same reserves in its rate base as "used and useful property." Upon transferring the leases to Hugoton, Panhandle received, as part of the return, *"the option to purchase on and after January 1, 1965, all or part of the gas produced from this land."* It was not until *after* the leases were transferred that Hugoton contracted to sell the gas produced from those leases for intrastate consumption; *and such contract had a limited life of only 15 years.*

In the light of these facts, it is apparent that, contrary to petitioners' assertions, gas produced from the leases involved in *Panhandle* was "intended" for interstate transportation both before and after the leases were transferred, and that commitment of such gas to intrastate consumption was for a limited period only.

In our case, "intent" as to the destination of the Rayne gas rested with the purchaser of the leases, Texas Eastern. But neither the intent of Texas Eastern nor its conduct

after acquiring the leases, can transform the Assignors' sale of interests in real property located wholly within the State of Louisiana into a sale of the commodity, natural gas, "in interstate commerce for resale."

(3) As to the issue presented and decided in *Panhandle*

Petitioners assume that *Panhandle* presented an extremely narrow question.[38] This Court, however, stated at the outset of its opinion that it was disposing of a broad and basic problem, namely: "the scope of the power over the gas reserves of a natural-gas company given to the Federal Power Commission by the Natural Gas Act" (337 U.S. at 499). This Court's resolution of that problem was equally fundamental: The Act "expressly exempts from its coverage . . . the production and gathering of natural gas"; and such exemption embraces "the facilities, such as reserves and gas leases" used for production (at 504). "Of course leases are an essential part of production" (at 505). "[T]he transfer of undeveloped gas leases is an activity related to the production and gathering of natural gas and beyond the coverage of the Act" (at 515).

Having postulated quite a different main issue from the one actually considered and decided by this Court, petitioners easily devise numerous fine "distinctions" between

[38] FPC insists that the main question in *Panhandle* was "whether, without Commission approval, an interstate pipeline could make any disposition whatever of leases which had been included in its rate base and relied on to support its applications for certificates of public convenience and necessity" (FPC Br. p. 34). UGI avers that the controversy in *Panhandle* "turned upon the extent of the Commission's authority to go beyond its certificating and rate-making function and to interfere with the management decisions of Panhandle dealing with its property, where such dealing might have a significant indirect effect upon those Commission functions, even though the transaction complained of was not a sale of gas in interstate commerce for resale." (UGI Br. p. 25)

Panhandle and the case at bar. Starting with a false major premise, petitioners inevitably arrive at false conclusions.

C. The *Phillips* case in no way modified the doctrine of *Panhandle*

There is one crucial distinction between the *Panhandle* decision and the determination of this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954): *Panhandle* dealt with the scope of FPC jurisdiction over conveyance of leasehold interests in land, while *Phillips* concerned the scope of FPC jurisdiction over contractual sales of the commodity, natural gas, *after it had been extracted from the land*. This fundamental distinction goes to the heart of the present controversy, because here we face the self-same issue that was resolved in *Panhandle* and not the issue determined in *Phillips*.

In deciding *Phillips*, this Court in no way modified *Panhandle*. On the contrary, *Phillips* cited *Panhandle* approvingly for the precise proposition that "the 'natural and clear meaning' of the phrase 'production or gathering of natural gas' is that it encompasses *'the producing properties* and gathering facilities of a natural-gas company'" (347 U.S. at 678).

The basic distinction between *Panhandle* and *Phillips* was clearly pointed out in both of the Courts of Appeals opinions rendered in the case at bar. Thus, in *PSC* v. *FPC*, 287 F. 2d 143, the D.C. Circuit observed:

> "Sales of natural gas by an independent producer are subject to regulation under Sections 4 and 5 of the Natural Gas Act. [citing *Phillips*] But the Commission has been held to lack jurisdiction over gas leases. [citing *Panhandle*]." (287 F. 2d at 145; R. 864)

And the Fifth Circuit, explaining its determination now under review, said:

> "The *Panhandle* case, however, held that transfers of gas leases are exempt as an activity related to production and gathering. The Court in *Phillips* expressly recognized this holding [347 U.S. at 687], but was there able to find jurisdiction because 'production and gathering, in the sense that those terms are used in § 1(b), end before the sales by Phillips occur.' [Ibid.]." (336 F. 2d at 325; R. 1287)

Petitioners' heavy reliance on *Phillips* is, therefore, obviously misplaced.

II.

The conveyance of leasehold interests involved in this case was neither a "sale of natural gas" nor a sale "in interstate commerce," and therefore was not within the affirmative authority delegated to the Commission under the Act

Congress carefully limited the regulatory scope of the Natural Gas Act. "Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 516 (1947). Thus, FPC's jurisdiction was precisely circumscribed by the affirmative grant of regulatory authority in Section 1(b), as well as by the specified exemptions.[39]

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[39] Such exemptions included "any other transportation or sale of natural gas" and "the production or gathering of natural gas." These exemptions, however, were "not actually necessary, as the matters specified therein could not be said fairly to be covered

To fall within the ambit of FPC's regulatory powers under the Act, a transaction must entail a "sale of natural gas" and such sale must be "in interstate commerce." The transaction here under review met neither of these jurisdictional prerequisites. It follows that the Commission lacked any authority whatever to regulate the Assignors' conveyance of their Rayne Field leasehold interests.

A. The conveyance of Rayne Field leasehold interests was not a "sale of natural gas"

The Natural Gas Act is concerned solely with "natural gas" when it is in the form of *a commodity* that can be transported and sold "in interstate commerce." Section 2(5) of the Act defines "natural gas" to mean "either natural gas unmixed, or any mixture of natural and artificial gas." The stuff so defined can only be a vaporous substance (natural gas) which has previously been extracted from a subterranean reservoir and thereby converted into a commodity capable of admixture with a similar vaporous substance (artificial gas).[40]

Section 2(7) of the Act defines "interstate commerce" as including "commerce between any point in a State and any point outside thereof." Only a commodity — e.g., natu-

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by the language affirmatively stating the jurisdiction of the Commission . . . HR Rep. No. 709, 75th Cong. 1st Sess. p. 3." *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. at 504, footnote 5.

As noted in footnote 16 to the *Panhandle* opinion (337 U.S. at 512), another bill before Congress would have made the Act apply to "the procurement of natural gas" for transmission and sale in interstate commerce. But that bill failed of adoption; instead Congress enacted Sec. 1(b).

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[40] Before natural gas is produced, it remains imbedded in strata of porous rock deep in the earth's crust. There is no way to mix natural gas in that state of its existence with "artificial" gas manufactured above ground out of coal or oil.

ral gas *after* its extraction from its original habitat — can be moved from place to place in commerce.

This Court has heretofore twice taken note of the fact that natural gas does not become a commodity, and therefore a subject of commerce, until it has been brought to the surface and reduced to possession. *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923). In the first of those cases, this Court said (221 U.S. at 255):

> "Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce."

And in the second case cited this Court said further (262 U.S. at 586):

> "Natural gas is found at pronounced depths in porous strata — usually sand rock — constituting a natural reservoir, and is brought to the surface and reduced to possession through wells drilled into the containing strata. When a surface owner thus reduces it to possession he becomes its owner and it becomes a subject of commerce, like any other product of the forest, field or mine."[41]

The fact that Assignors actually sold leasehold interests, and not a commodity, appears on the face of the Assigment

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[41] In other words, the difference between realty and a commodity is fundamental. A standing forest is not felled timber, a farm is not reaped wheat, a mountain is not mined ore and mineral acreage is not produced oil or gas. Clearly, an oil and gas lease represents an interest in land; and when oil or gas is produced, it is just as clear personal property. I Williams & Meyers, Oil & Gas Law (1964 ed.), § 212, pp. 120, 122.

and Conveyance of July 27, 1959 (R. 184).[42] By that instrument, as the Commission itself represented to the D.C. Court of Appeals: "The assignors would wholly alienate their rights to produce natural gas" (R. 1188). And the Court below so found and held: "The assignors retained no operating rights" (336 F. 2d at 324; R. 1286).

When, therefore, the Assignors conveyed their leasehold interests in the Rayne Field, Assignors did not sell the commodity, natural gas.[43] At that time, the hydrocarbon substances beneath the leased properties lay buried in strata some two miles or more below the earth's surface, where those substances had been formed and accumulated millions of years before. *Such hydrocarbons were then a part of the realty;* they had not yet been brought to the surface and reduced to possession.[44] Hence, they were not then a commodity capable of transportation and sale in commerce.

It follows inescapably that the transaction of July 27, 1959, between the Assignors and Texas Eastern was not, and could not be, a "sale of natural gas" over which the Commission possesses regulatory authority.

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[42] To appreciate the complete difference between a conveyance of leasehold rights and interests and a sale of natural gas after its production, compare the Assignment and Conveyance (R. 184 *et seq.*) with one of the abortive gas sales contracts proposed by the parties in 1957 (Ex. 3-f, R. 99 *et seq.*). The latter, typical of the contracts employed for the purpose in the industry, is replete with terms, conditions and provisions wholly foreign to a conveyance of leasehold interests.

[43] FPC expressly so found in its Opinion No. 322, based on the identical Assignment and Conveyance that is now before this Court: "the purchase of the leases is not a contract to purchase gas" (21 FPC at 867; R. 462).

[44] Texas Eastern did not begin to move any of its gas from the Rayne Field until August 1959 (R. 721, 906, 908). Production of that gas is expected to continue over a period of 31 years, until 1989 (R. 535; Ex. X-5, R. 752). A substantial volume of the gas in place will remain in the reservoirs when the field is ultimately abandoned (R. 693; Ex. X-2, R. 745).

B. The conveyance of Rayne Field leasehold interests was not a sale "in interstate commerce"

Not only was the Rayne Field lease conveyance beyond the sphere of the Commission's regulatory powers because there was no sale of "natural gas," but also because such conveyance was not a sale "in interstate commerce." It is a physical impossiblity to sell in commerce, interstate or otherwise, real property rights in rock formations deep down in the bowels of the earth. As Commissioner Woodward pointed out so succinctly in his dissenting opinion (R. 1232-1233):

> "The leasehold sale was not a sale in interstate commerce; it affected only rights and interests in real property located wholly within the State of Louisiana."

To express the limited nature of the authority delegated to the Commission, Congress employed in Section 1(b) of the Act the restrictive phrase, "sales of natural gas *in* interstate commerce for resale." This Court has frequently held that a federal statute which applies solely to matters "*in* interstate commerce" is far narrower than one which applies broadly to matters which "affect," "restrain," "burden" or "promote" such commerce.

Thus, in *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349 (1941), the controversy concerned the scope of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45), which makes unlawful "unfair methods of competition in commerce." Use of those words was held to limit the kinds of activities proscribed by that Act. Speaking through Mr. Justice Frankfurter, this Court concluded (312 U.S. at 355):

> "This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in [interstate] commerce' as though it meant 'unfair methods of com-

petition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished."

See also *Polish National Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 647 (1944).[45]

Several other examples of the restrictive scope accorded to enactments which apply to transactions or persons "*in* interstate commerce" can be cited.[46]

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[45] "Again, half a dozen enactments, other than the National Labor Relations Act, are sufficient to illustrate that when it [Congress] wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect,' 'interrupt,' or 'promote' interstate commerce." (322 U.S. at 647)

[46] For example, the regulatory limits of the Robinson-Patman Act, which relates to persons "engaged *in* commerce" and who discriminate in price "*in the course of* such commerce" (15 U.S.C. § 13(a)), were pointed out in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 236 (1951) and *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F. 2d 943, 946 (6th Cir. 1962); *cert. den.* 373 U.S. 934. By way of contrast, it has been held that Sec. 1 of the Sherman Act (15 U.S.C. § 1), outlawing contracts, combinations and conspiracies "in restraint of trade or commerce," covers all restraints having a substantial effect on interstate commerce. *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948).

When enacted in 1908, the Federal Employers Liability Act was confined to injuries suffered by persons employed by a carrier and engaged *in* interstate commerce. This was held to exclude an employee who was injured while mining coal. *Delaware, Lackawana & W. R. Co.* v. *Yurkonis*, 238 U.S. 439, 444 (1915). The Act was amended in 1939 to apply to employees whose duties *affect* interstate commerce (45 U.S.C. § 51). This change was held to extend the Act's coverage to employees not directly engaged in interstate commerce. *Southern Pacific Co.* v. *Gileo*, 351 U.S. 493, 498-499 (1956); *Reed* v. *Pennsylvania R. Co.*, 351 U.S. 502, 504-508 (1956).

Similarly, the Fair Labor Standards Act has been construed as having restricted scope, because it applies to employees "in

Besides limiting the Commission's authority to "sales of natural gas in interstate commerce," Section 1(b) expressly exempts "any other . . . sale of natural gas." This necessarily excludes any sale of leasehold interests in lands containing natural gas deposits. While such a transaction may "affect" interstate commerce, it is by its very nature a purely local event.

The conveyance of leases in the present case was not only local in character but, since it constituted a transfer of title to mineral interests in realty, it was subject to regulation by the State of Louisiana. Each State clearly has power to, and does, regulate all transfers of titles to, and interests in, lands within its boundaries. If there were the slightest merit to petitioners' contention — that the transfer of Assignors' Rayne Field leases should be deemed a "sale of natural gas in interstate commerce"—then the states would be powerless to regulate any transfer of titles or interest in productive or potentially productive gas properties. Manifestly, Congress never imagined, let alone intended, that the Natural Gas Act would produce any such grotesque result.

C. No aspect of the parties' normal business arrangements, made in good faith, did or could convert the conveyance of leasehold interests into a sale of natural gas in interstate commerce

In its July 1960 brief to the D.C. Court of Appeals, the Commission correctly represented that this case "centers about the sale of leases. It does *not* concern a purchase of

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industries engaged *in* commerce or *in the production of goods for* commerce" (29 U.S.C. § 202). *Kirschbaum* v. *Walling*, 316 U.S. 517, 522-523 (1942); *Walling* v. *Goldblatt Bros., Inc.*, 128 F. 2d 778, 781-782 (7th Cir. 1942), cert. den. 318 U.S. 757; *Mitchell* v. *Zachry Co.*, 362 U.S. 310, 314-316 (1960).

gas in place within the underground reservoir (which Louisiana law does not recognize).[47] Nor does it involve a contract to sell gas as produced by the assignors" (R. 1185).

Since February 6, 1963, however, the Commission has insisted that black is white; that the sale of Rayne Field leases was really a "sale of natural gas in interstate commerce for resale." When the FPC's contention is stripped of ratch words and confusing argumentation,[48] it is seen

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[47] In Louisiana, a lease does not convey title to subsurface minerals or to oil or gas "in place." *Frost-Johnson Lumber Co.* v. *Salling's Heirs*, 150 La. 756, 91 So. 207, 243 (1920); *Elkins* v. *Townsend*, 296 F. 2d 172, 173 (5th Cir. 1961). By statute, oil and gas leases are classified as "real rights and incorporeal immovable property" and the owners of such leases "have the benefit of all laws relating to the owners of real rights in immovable property or real estate." La. Rev. Stat., Tit. 9, Sec. 1105. "A mineral lessee or sublessee . . . is the owner of a real right." La. Code of Civ. Proc., Art. 3664.

These property laws of Louisiana cannot be ignored. "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . . There is no federal general common law." *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). "Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law." *FPC* v. *Niagara Mohawk P. Corp.*, 347 U.S. 239, 252 (1954). "The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state. The custom of resorting to them *to give meaning and content to federal statutes* is too old and its use too diversified to permit us to say that considerations of nationwide uniformity must prevail in a particular case over our judgment that it is out of harmony with other objectives more important to the legislative purpose." *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 155-156 (1944). See also *Commissioner of Int. Rev.* v. *Stern*, 357 U.S. 39, 45 (1958); *United States* v. *Certain Property, etc.*, 306 F. 2d 439, 444-445 (2nd Cir. 1962).

[48] Dissenting Commissioner Woodward aptly described the FPC's assertion of jurisdiction over the sale of Rayne Field leasehold rights as based on "an unsupported, vague and obscure dissertation" (R. 1232).

to be based *entirely* on the five "features" of the transaction which were pointed to accusingly in Opinion No. 378, namely: (1) Assignors' reservation of rights in deep horizons and in crude oil and other minerals; (2) Assignors' reservation of a production payment payable out of proceeds from sales of condensate; (3) provision for acceleration of the purchase-money notes in the event of stepped-up depletion of the Rayne Field reserves; (4) the Management Agreement under which Continental was employed to operate the field as agent for Texas Eastern; and (5) direct liability of Louisiana Gas, rather than Texas Eastern, on the purchase-money notes.

These five "features" were, one and all, valid, reasonable and in no wise unusual in a transaction of the character and magnitude of the one here in controversy (see the opinion below, 336 F. 2d at 324-325; R. 1285-1287). Each such "feature" was, moreover, entirely consistent with a bona fide sale of leasehold interests.[49]

(1) *Reservation of rights* in deep, unexplored strata and in oil and other minerals did not, and could not, transmute the remaining leasehold rights conveyed by Assignors to Texas Eastern into the commodity, natural gas.[50] Such res-

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[49] In its Opinion No. 322, the Commission said: "There was no evidence or implication that the negotiations leading to the lease purchase and sale agreements were anything but arm's-length and we find that they were arrived at on the basis of arm's-length bargaining" (R. 462). Texas Eastern "negotiated the lease purchases at arm's length and in good faith" (FPC 1960 Brief, R. 1209).

[50] The reason for these reservations is divulged at page 21 of FPC's brief: "Moreover, since the purchaser [Texas Eastern] was an interstate pipeline, it is clear that its primary interest was in obtaining gas, rather than other minerals." That is precisely why Texas Eastern decided not to pay additional millions of dollars for leasehold rights in unexplored deep formations and in substances other than gas.

ervations of rights in untested deep horizons and in particular minerals are common and accepted industry practice in the conveyancing of producing leaseholds.[51]

(2) *The reservation of a production payment,* payable out of the proceeds from sales of condensate, was likewise in line with normal practice.[52] This feature of the transaction (a) relieved Texas Eastern from paying Rayne Field operating costs; (b) provided Texas Eastern with the prospect of substantial additional income after the reserved production payment is satisfied; and (c) conserved Texas Eastern's cash resources by materially reducing the aggregate purchase price.

(3) *The provision for accelerated payment of the purchase-money notes* in inverse order of maturity, in case of exceptionally high takes from the Rayne Field, was a normal business method of assuring the continuing sufficiency of Assignors' collateral security.[53] The notes were secured by mortgages on the transferred leasehold interests; and for sound business reasons Texas Eastern assumed no corporate liability for the payment of the unpaid balance of the purchase price. (See footnote 10, *ante,* p. 8). If Texas Eastern could, by stepped-up production, deplete the field in less than 16 years, the late-maturing notes would become unsecured; foreclosure of the mortgages on depleted properties would then be unavailing.

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[51] See 3 Summers, Oil and Gas (Perm. ed. 1958), 603, 614; 2 Williams & Meyers, Oil and Gas Law (1964 ed.) 269; Merrill, *The Oil and Gas Lease — Major Problems,* 4 Neb. L. Rev. 488, 528, 531 (1962).

[52] R. 83; and see: Bryan, *Overriding Royalty under Oil, Gas and Mineral Leases in Louisiana,* 29 Tul. L. Rev. 340, 349 (1954).

[53] Cf. *Joergenson* v. *Joergenson,* 28 Wash. 477, 68 Pac. 913 (1902); where the note provided for acceleration if the maker should sell or remove timber from the mortgaged premises.

There was no acceleration in the familiar sense of maturing the entire debt or hastening payment of the early notes. Payment was not "geared to production" as FPC asserts; there was no provisions for *decelerated* payments in the event of *decreased* production. Moreover, Texas Eastern's substantial down payment could in no way be "geared to production." (See R. 68-69)

(4) *The Management Agreement* was entered into for the perfectly legitimate safety and business reasons recited in its preamble, which we have heretofore quoted and discussed (*ante*, pp. 12-14, including footnotes 16 and 17). Continental acts under the Agreement simply as the agent of Texas Eastern (R. 828); and it is Texas Eastern, not Continental, who has the right to make all important operating decisions, including the right to nominate the volume of gas to be produced each month (see *ante*, pp. 13-14). Contracts of this nature are not uncommon.[54]

(5) *Interposition of Louisiana Gas Corporation* shielded Texas Eastern against direct liability (FPC Opinion No. 322, R. 459). "[T]he manner in which Texas Eastern's arrangements for the purchase of leases were consummated is not unique in the gas and oil business.[55] Texas Eastern's primary reasons for handling the arrangements through an intermediary corporation, Louisiana Gas Corporation, was so it would not have any liability for the amount of the notes on its books" (FPC Opinion No. 322, R. 462; and see supporting testimony, R. 87-88).

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[54] See 3 Summers, Oil and Gas (Perm. ed. 1958) 708.

[55] There is ample evidence to this effect in the record (R. 86-87), as FPC took pains to point out in its 1960 brief to the D.C. Court of Appeals (R. 1188, footnote 13): "[I]t is not uncommon for a mortgage to be given with the stipulation that the mortgagor shall not be personally bound beyond the value of the property so mortgaged." *Schexnailder* v. *Fontenot*, 147 La. 467, 85 So. 207, 210 (1920). See also Annotations, 17 A.L.R. at 717; 25 A.L.R. at 1487.

Thus, when these five "features" are viewed objectively, it becomes apparent that they were normal business arrangements which the parties worked out in good faith through arm's length negotiations. These "features" did not and could not convert a sale of leasehold interests in real property into a "sale of natural gas in interstate commerce for resale."

III

The decision of the Court of Appeals, D.C. Circuit, that FPC lacked jurisdiction over the conveyance of Rayne Field leases, was final and binding upon the Commission.

The Commission held in its Opinion No. 322 that it had no jurisdiction over the conveyance of Rayne Field leases (R. 456) and that "the purchase of leases is not a contract to purchase gas" (R. 462). The comprehensive brief filed by the Commission in the D.C. Circuit Court of Appeals repeatedly disclaimed such jurisdiction, because the doctrine laid down by this Court in *FPC* v. *Panhandle* was decisive on that question (R. 1182, 1183, 1184, 1195, 1198, 1200, 1201, 1205, 1212). The D. C. Circuit sustained this FPC position (*PSC* v. *FPC*, 287 F. 2d 143, 145; R. 864).[56] The Court further held:

[56] In its Annual Report to Congress for 1961 the Commission accurately described the D.C. Circuit's holding: "Where a pipeline company acquired leasehold interests in natural gas reserves rather than purchasing the gas from producers, the District of Columbia Court of Appeals *held that while the sale was 'non-jurisdictional,'* the acquisition costs are relevant matters within the Commission's jurisdiction and should be examined by the Commission" (41 FPC Ann. Rep. 18). In Opinion No. 378, the Commission admitted further that: "The reviewing court, without discussion, *agreed with the Commission on the question of jurisdiction,* but held that we should have either disclaimed approval of the price under the lease sale or should have examined the justification for the price" (R. 978).

"It is of no importance here that the transactions by which Texas Eastern proposes to acquire the gas will themselves be, by virtue of a change in form, *beyond the regulatory control of the Commission.* The pipeline construction project and the transactions by which Texas Eastern will dispose of the gas thus acquired clearly are within the Commission's jurisdiction . . . . the Commission's warrant to inquire arises by virtue of its responsibility to regulate the purchaser, *regardless of the status of the seller.*" (287 F. 2d at 146; R. 866)

The D. C. Circuit therefore remanded the case with directions that the Commission follow one of two specified "courses," neither of which pertained in any way to the question of the Commission's jurisdiction over the Assignor's sale of their leasehold interests (287 F. 2d at 146; R. 867).[57] Both at the end of its opinion and in its judgment (R. 868) the Court stated that the remand was *"for further proceedings not inconsistent with the opinion of this court."*

We submit that the decision of the D. C. Circuit, no review of which was ever sought in this Court, became final and binding upon the Commission so far as its jurisdiction in this case is concerned. We base this position both on the explicit provisions of Section 19(b) of the Natural Gas Act and on the familiar principle of "the law of the case".[58]

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[57] "The court remanded the case *with instructions* that the Commission expressly disclaim approval of the price or that it reopen the record to permit the pipeline company to establish that the acquisition costs will be consistent with the public convenience and necessity" (41 FPC Ann. Rep. 18).

[58] The Court below, having decided that the Commission lacked jurisdiction over the sale of leases, found it unnecessary to determine these questions (336 F. 2d at 326; R. 1288).

A. Under Section 19(b) of the Natural Gas Act, the D.C. Court of Appeals' judgment was "final"

Review of the Commission's Opinion No. 322 by the Court of Appeals, D.C. Circuit, was had pursuant to Section 19(b) of the Natural Gas Act (15 U.S.C. §717r (b)). The pertinent provisions are quoted *ante*, p. 3. That Section gives the Court of Appeals in which a petition for review and the record are properly filed "exclusive" jurisdiction to affirm, modify or set aside an FPC order. The Section then declares that:

> "The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, *shall be final*, subject to review by the Supreme Court of the United States upon certiorari or certification . . ."

In *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), this Court considered identical language appearing in Section 313 (b) of the Federal Power Act (16 U.S.C. § 825l(b)), another statute administered by FPC. As to the conclusiveness of a Court of Appeals affirmance of an FPC order, this Court said (357 U.S. at 336-337):

> ". . . Congress in § 313 (b) prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders . . . It there provided that any party aggrieved by the Commission's order may have judicial review . . . and that '[t]he judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission *shall be final*, subject to review by the Supreme Court of the United States . . .' (Emphasis added). *It thereby necessarily precluded de novo litigation between the parties of all issues inhering in the controversy* and all other modes of judicial review . . . . For Congress, acting within its powers, has declared that the Court of Appeals shall have 'exclusive jurisdiction' to review

such orders, and that its judgment 'shall be final', subject to review by this Court upon certiorari or certification. Such statutory finality need not be labeled res judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts."[59]

In the case at bar, the question of FPC's jurisdiction over the Rayne Field lease sale was an issue inhering in the controversy resolved by the D. C. Court of Appeals' judgment. The Court clearly held that such jurisdiction was lacking.[60] There having been no review in this Court of the D. C. Circuit's judgment, it became "final" as dictated by Section 19(b). Accordingly, the Commission was forever after precluded from determining the jurisdictional question in this case in a way contrary to the appellate court's judgment.

B. The D. C. Court of Appeals' mandate to the Commission established the law of this case.

As we have seen, the D. C. Court of Appeals did three things: (1) it held that FPC lacked jurisdiction over the conveyance of Rayne Field leasehold interests; (2) it instructed the Commission to follow one of two "courses" — either disclaim approval of the price Texas Eastern paid for the leases, or permit Texas Eastern to justify that price; and (3) it remanded the case to the Commission "for further proceedings not inconsistent with the opinion of this court" (287 F. 2d at 145, 146; R. 864, 867, 868). The mandate of the

[59] The italicized words "shall be final" were so emphasized by the Court.

[60] Not only did the Court expressly so hold, but it sent the case back to the Commission with instructions to follow one of two "courses", neither of which in any way involved the jurisdictional question. If there had been a possible third alternative — i.e., assertion of jurisdiction over the Assignors because they had sold gas in interstate commerce — the Court would have been bound to include that third alternative in its mandate.

D. C. Court of Appeals accordingly established what is known as "the law of the case".

The rule of "the law of the case" — that an inferior tribunal has no power or authority to deviate from the mandate issued by an appellate court — has been universally followed for over a century.[61] Whatever was before the appellate court and disposed of by its decree is considered as finally settled; the inferior tribunal is bound by that decree and must carry it into execution; the inferior tribunal cannot vary the decree, review it even for apparent error, or give any other or further relief.[62] The upper court's mandate is completely controlling as to all matters within its compass; since the appellate judgment concludes the parties as to all issues which were or could have been decided on appeal, such judgment puts all those issues out of the reach of the inferior tribunal on remand of the case.[63] The pronouncements of the reviewing court become the rules which thereafter govern the dispute at hand; and the inferior arbiter must obey "the law of the case" even when the inferior arbiter finds itself in well founded disagreement with its reviewer.[64]

Upon remand of a case with instructions to inquire into specified matters, the inferior tribunal has nothing before it except those particular matters and may determine them

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[61] *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948).

[62] *Sibbald* v. *United States*, 12 Peters 488, 492 (1838); *Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *Re Potts*, 166 U.S. 263, 265 (1897); *Illinois ex rel. Hunt* v. *Illinois C. R. Co.*, 184 U.S. 77, 91 (1902).

[63] *Thornton* v. *Carter*, 109 F. 2d 316, 320 (8th Cir. 1940); *Paull* v. *Archer-Daniels-Midland Co.*, 313 F. 2d 612, 617 (8th Cir. 1963).

[64] *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 204 F. 2d 529, 532 (7th Cir. 1953); cert. den. 346 U.S. 909; rehearing den. 346 U.S. 940.

"and nothing more".[65] The inferior tribunal is, of course, foreclosed from making any determination which contravenes the appellate court's decision.[66] The lower tribunal is then without power to do anything contrary to either the letter or spirit of the mandate construed in the light of the appellate court's opinion.[67]

The opinion delivered by the appellate court upon rendering its decree may be consulted to ascertain what was intended by its mandate.[68] And a remand "for further proceedings not inconsistent with the opinion of this court," or words to that effect, operates to make the opinion a part of the mandate as though set forth therein at length.[69]

The rule of "the law of the case" applies to remands to federal administrative agencies just as it does to remands to lower federal courts.[70]

Sound judicial policy dictates adherence to "the law of the case," as this Court explained in *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U. S. 335 (1945):

> "Finality to litigation is an end to be desired as well in proceedings to which an administrative body

[65] *Illinois ex rel. Hunt* v. *Illinois C. R. Co.*, 184 U.S. 77, 92 (1902).

[66] *United States* v. *Haley*, 371 U.S. 18, 19-20 (1962).

[67] *Thornton* v. *Carter*, 109 F. 2d 316, 320 (8th Cir. 1940); *Paull* v. *Archer-Daniels-Midland Co.*, 313 F. 2d 612, 617 (8th Cir. 1963).

[68] *Re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895); *Re Potts*, 166 U.S. 263, 266 (1897).

[69] *Gulf Refining Co.* v. *United States*, 269 U.S. 125, 135 (1925); *Bailey* v. *Henslee*, 309 F. 2d 840, 843 (8th Cir. 1962).

[70] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 140 (1940); *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U.S. 335, 339-341 (1945); *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 204 F. 2d 529, 532 (7th Cir. 1953); cert. den. 346 U.S. 909; rehearing den. 346 U.S. 940.

is a party as in exclusively private litigation. The party adverse to the administrative body is entitled to rely on the conclusiveness of a decree entered by a court to the same extent that other litigants may rely on judgments for or against them." (325 U.S. at 340)

"Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction." (325 U.S. at 341)[71]

Similar policy considerations are thoughtfully explained in *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 204 F. 2d 529, 532 (7th Cir. 1953); cert. den. 346 U.S. 909; rehearing den. 346 U.S. 940 (which involved a situation closely parallel with that in our case) and in *Kaku Nagano* v. *Brownell*, 212 F. 2d 262, 263 (7th Cir. 1954).

We conclude that the rule of "the law of the case" is clearly applicable here.[72] That being so, the Commission was confined, after the remand from the D. C. Court of Appeals, to the two "courses" prescribed in the Court's opinion and was foreclosed from determining the jurisdictional question in this case in a manner diametrically

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[71] *A fortiori*, there must be an immediate end to disputes between administrative agencies and those over whom they have *no* jurisdiction.

[72] In our case, the evidence bearing on FPC's jurisdictional authority following remand was the same as the evidence in the record reviewed by the D.C. Court of Appeals. The rule of "the law of the case" cannot, therefore, be avoided by claiming that new and different evidence was adduced after the remand. See *Kaku Nagano* v. *Brownell*, 212 F. 2d 262, 263 (7th Cir. 1954). Nor can anything be made out of the fact that the Assignors were not parties to the D.C. Circuit review proceeding. The Commission was there, and the Court's holding on the jurisdictional question was binding on the Commission. That is sufficient, so far as "the law of the case" is concerned, especially when, as in our controversy, the outcome depends solely on the construction of contracts. *Zdanok* v. *Glidden Co.*, 327 F. 2d 944, 953 (2nd Cir. 1964); cert. den. 377 U.S. 934.

opposite to the Court's explicit holding that FPC lacked jurisdiction over the conveyance of the Rayne Field leasehold interests. As Commissioner Woodward so forcefully expressed it:

> "In my judgment, that opinion [*PSC* v. *FPC*, 287 F. 2d 143] conclusively settled the jurisdictional question. The leasehold sale was not a sale in interstate commerce .... Any other conclusion disparages the Court of Appeals adjudication — this fact is indisputable. *If permitted, this Commission's course of action would destroy the rights of parties to court review and render the decision of the courts meaningless.*" (R. 1232-1233).

IV

Lack of jurisdiction over conveyances of leasehold interests neither frustrates effective FPC regulation nor creates a regulatory "gap"

The Commission contends that, if allowed to stand, the decision of the Court below "would provide a simple mechanism for avoiding effective regulation" and thereby create a "gap" in FPC's regulatory system (FPC Br. pp. 17, 36-38).[78] This whole argument is fruitless because: (a) the Commission *does* have ample authority to regulate effectively pipeline acquisitions of leasehold interests in gas reserves; (b) any additional powers the Commission desires in this area can only be granted by Congress; and (c) the record in the instant case established that the Commission has no real need for additional authority, since Texas Eastern's investment in the Rayne Field leases was in all respects prudent and in the public interest.

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[78] UGI is hardly in a position to join in this contention. Not only did it offer no objection to Texas Eastern's acquisition of the Rayne Field leases (R. 22-23), but UGI argued that the Commission didn't need to assert jurisdiction over the transaction "to effectively control the situation" (R. 727).

A. The Commission has ample authority to regulate effectively pipeline acquisitions of leasehold interests in gas reserves

The Commission can effectively protect gas consumers by regulating the pipeline *purchaser* of leases covering gas reserves rather than by regulating the *seller*. FPC has ample authority to inquire into the pipeline's acquisition costs and to decide whether or not they were prudent; and if such costs are found to have been improvidently excessive, the Commission can prevent the excess from being passed on to gas consumers.

It is abundantly clear that FPC can perform its regulatory functions satisfactorily by inquiring into the prudence of pipeline acquisitions of leasehold interests. Two Courts of Appeals have unanimously so concluded in this case (287 F. 2d at 146 and 336 F. 2d at 326). The Tenth Circuit came to the same conclusion in the "Bastian Bay" case. See *Tennessee Gas Transmission Co.* v. *FPC*, 340 F. 2d 100, 102 (1965). UGI conceded that, without asserting jurisdiction over the sale of leases, the Commission could "effectively control the situation" (R. 727). Commissioner O'Connor was persuaded that: "There is nothing inherent in a one-shot transaction that precludes effective regulation" (R. 983).[74] Commissioner Woodward, for reasons he so cogently expressed, disavowed the majority's whole course of conduct (R. 1230-1233). Thus, this case is here

[74] Commissioner O'Connor went on in his separate opinion, to show why this is so, and concluded: "The net effect [of the majority's position] would be that a pipeline with the staff, facilities, and finances for exploration and development could obtain its own production with all the advantages thereof, but a pipeline not in a position to carry out an exploration program could not obtain its own production by purchasing proven reserves in place. Such a result, I submit, would be violative of the public interest" (R. 983-984).

because a bare majority of three Commissioners have tried to expand their powers far beyond permissible statutory limits.

Over four years ago, the D. C. Court of Appeals directed the Commission to "regulate the purchaser, regardless of the status of the seller" by ascertaining whether Texas Eastern's acquisition costs "will be consistent with the public convenience and necessity" (287 F. 2d at 146; R. 867). Although the Commission at first embarked upon such an inquiry (R. 869-872), it later decided to disobey the D.C. Circuit's mandate. Rather than do what the appellate court had directed — appraise Texas Eastern's acquisition costs — the Commission "deferred" any decision on that question (R. 981, 1229) and elected, instead, to attempt to usurp forbidden powers.

Last August, the Fifth Circuit again remanded the matter to the Commission "to determine whether the public convenience and necessity require that the [Texas Eastern] certificate be denied, granted, or granted conditionally, in view of the cost of acquisition" (336 F. 2d at 326; R. 1289)[75]. Instead of accepting this second appellate mandate, the Commission sought review in this Court.

Extensive evidence was introduced in this case by Texas Eastern showing the reasonableness of its lease acquisition costs. Despite the mandates of two Courts of Appeals, the Commission steadfastly refused to pass on this issue. Instead, FPC reached for more power than Congress had granted. Until the Commission has at least tried in good faith to perform its regulatory functions, we submit it has no basis for saying that the method of regulation directed by the Courts of Appeals is "ineffective."

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[75] The Court added: "We note with regret that this is essentially what the D.C. Circuit told the Commission to do three and one-half years ago" (336 F. 2d at 326; R. 1289).

As shown by the evidence reviewed in the Appendix to this brief, the reasonableness of the cost of leases to a pipeline company can be determined in a certificate case under Section 7(c) of the Act; and in this way the Commission can adequately safeguard consumer interests. There is, accordingly, no prospect of frustration of "effective" regulation; there is no regulatory "gap"; and there is no lack of protection for consumers.

At the end of its brief (pp. 38-41), the Commission offers a number of forebodings and excuses in a vain effort to show that regulation of a pipeline purchaser of leases might not work to perfection. This entire line of argument, however, is based on pure speculation. None of the contrived risks, hazards and adverse possibilities portrayed in FPC's brief is present in the case at bar. The outcome here surely does not depend upon imaginary different circumstances which might conceivably appear in the record of some hypothetically different case.

B. Only Congress can bestow upon the Commission the added regulatory powers it professes to need

In *Panhandle*, this Court told the Commission that if it wanted "power to control the disposition of leases by natural-gas companies, it is authorized to call the attention of Congress to that fact" (337 U.S. at 515). The Commission has asked Congress for such power in 13 out of the last 14 years (see *ante*, p. 31-32). Taking note of these facts, the Court below added: "If in its wisdom Congress has declined to act, we have neither the power nor the inclination to act in its stead" (336 F. 2d at 326; R. 1288). There can be no doubt as to the soundness and correctness of this holding.

The Commission is entirely a creature of Congress and the determinative question here "is not what the Board [Commission] thinks it should do but what Congress has said it can do." *Civil Aeronautics Board* v. *Delta Air Lines*, 367 U.S. 316, 322 (1961, opinion by Mr. Chief Justice Warren). The Commission has heretofore been told in no uncertain terms that its quest for more authority than appears on the face of its grant should be addressed to Congress; not to the courts. *Border Pipe Line Co.* v. *FPC*, 171 F. 2d 149, 152 (D.C. Cir. 1948).

The identical arguments advanced by the Commission here — about regulatory necessity and jurisdictional "gap" — were presented and found wanting in *Panhandle*.[76] Acts of Congress should not, in effect, be amended every time an administrative agency complains that the existing statute is inadequate and therefore some fancied "gap" should be closed by means of judicial interpretation. As was so aptly stated (per Mr. Justice Frankfurter) in *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 617 (1944):

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. 'The natural meaning of words cannot be displaced by reference to difficulties in administration.'"

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[76] In its brief to this Court, the Commission protested as follows:

> "The existence of Commission control over a natural gas company's disposition of its gas reserves is necessary for effective regulation from several different aspects. The absence of such jurisdiction would result in substantial gaps in the comprehensive regulatory scheme of the natural gas industry envisioned by Congress. . . ." (Petitioner's Brief, U.S. Sup. Ct. No. 558, October Term 1948, at pp. 35-36).

C. The record here establishes that Texas Eastern's investment in the Rayne Field leases was in all respects prudent and in the public interest

The extensive evidence on this subject is summarized in the Appendix hereto. As appears from that summary, the amount which Assignors will receive for the Rayne Field leasehold interests they conveyed to Texas Eastern works out to 17.15¢ per Mcf. That is far below the going price for gas in southern Louisiana at the time of the lease conveyance and almost two cents per Mcf lower than the reduced "ceiling" price subsequently set by the Commission.

Texas Eastern's unit cost for the Rayne gas is lower still — 16.57¢ per Mcf — after giving credit for net revenues Texas Eastern will eventually receive from sales of condensate. Even if this unit cost is loaded with amounts Texas Eastern pays to persons other than the Assignors for royalty interest gas, and with Louisiana severance taxes, the unit cost is only 19.44¢ per Mcf. That is four to five cents per Mcf lower than the unit price Texas Eastern actually pays for comparable volumes of gas from any other source and between five and twelve cents per Mcf lower than Texas Eastern would have had to pay for any available alternative gas supply.[77]

In addition to providing Texas Eastern with just about the cheapest gas in its system, its Rayne Field leasehold interests enable it to realize many other advantages in the form of lower operating costs, greater flexibility and operating efficiency, and freedom from future gas price escalations and from triggering of gas prices under "most favored nation" clauses. Indeed, the Rayne Field lease acquisition

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[77] For purposes of comparison all prices were adjusted to reflect gathering and transportation costs up to a common point at Opelousas, Louisiana, where the Rayne gas enters the Texas Eastern trunk line system.

was the only means by which Texas Eastern could satisfy its customers' urgent requirements for additional gas deliveries and at the same time "hold the line" on the cost of gas to consumers (R. 544-549).

The record in this case shows that Texas Eastern's purchase of the Rayne Field leases was a most prudent investment and fully consonant with the public convenience and necessity. No additional regulatory authority is needed by the Commission in order to consider and decide this question — the only question open for determination under the appellate courts' mandates. The record here furnishes no ground whatever for judicial sanction of the Commission's attempted seizure of jurisdictional powers Congress has deliberately withheld and declined to bestow.

CONCLUSION

The judgment below of the United States Court of Appeals for the Fifth Circuit should be in all respects affirmed.

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APPENDIX

Summary of evidence justifying Texas Eastern's acquisition costs and demonstrating that its purchase of the Rayne Field leases was a prudent investment and consistent with the public convenience and necessity

1. Reasonableness of the Assignors' lease sale price. When the total lease sale price — $134.4 million — is divided by the estimated volume of recoverable gas reserves represented by the Assignors' 95% of the Rayne Field working interest — 783.5 million Mcf (R. 30; Ex. X-5, p. 13, R. 763) — it appears that Assignors will receive approximately 17.15¢ for each Mcf of such gas produced (R. 30, 460, 1191). So far as the Assignors are concerned, therefore, their "critical unit revenue" from the sale of their leases is 17.15¢ per Mcf (R. 1203-1204).

This computed 17.15¢ price is almost two cents per Mcf *below* the reduced "ceiling" price of 18.95¢ established by the Commission in October 1961 for initial sales of gas in southern Louisiana (R. 894, footnote 17). What is more, this computed 17.15¢ price is even farther *below* the prices prevailing in 1958 and the first half of 1959 for southern Louisiana gas, as was proved by an analysis of over 200 gas sales contracts on file with the Commission, scores of which contracts the Commission had approved and certificated unconditionally (R. 498-511, 545, 552; Ex. X-6, R. 765-814).

2. Reasonableness of Texas Eastern's lease acquisition costs. In addition to acquiring the Assignors' 95% working interest in the Rayne Field, Texas Eastern acquired, on similar terms, the remaining 5% of such working interests from others, none of whom is before this Court

(Ex. X-5, pp. 12, 13, R. 763; Ex. X-12, R. 820).[a] For the years 1961 through 1989 (the estimated remaining life of the field), Texas Eastern's net cost for its 100% working interest Rayne gas production will be 16.57¢ per Mcf (R. 556-565; Ex. X-4, R. 751).[b] Texas Eastern must pay out further sums, over the years, for royalty interest gas and Louisiana severance taxes, but such expenditures do not properly constitute any part of Texas Eastern's lease acquisition costs (R. 560-562). However, if those items at current rates are added to Texas Eastern's actual outlay for the 100% working interest, Texas Eastern's unit cost for Rayne gas will amount to 19.44¢ per Mcf (R. 567-568; Ex. X-14, R. 822).[c]

Petitioner's briefs do not even mention the evidence with respect to Texas Eastern's actual *lease acquisition costs*. Instead, they refer to the highest estimated unit *cost of service* (24.34¢ per Mcf) for making Rayne Field gas available over the 29-year life of the leases, including all costs of producing, gathering, separating, compressing and delivering the gas at high pressures, plus a 6% "rate of return", plus federal income taxes equal to 52% of such "return".[d] Such cost of service estimates of course have no

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a Such other parties are Dishman et al., Kirby, Muller and Texas Gas.

b This cost includes credit for Texas Eastern's $9 million of net revenues from condensate production, over and above operating expenses, after the production payments have been liquidated (R. 558-559; Ex. X-4, Col. F, R. 763).

c The computation adding these items to the true acquisition cost was requested by the FPC Staff (R. 563, 567).

d These cost of service estimates were prepared solely "for illustrative purposes" on the basis of "various assumptions" as to the rate of return Texas Eastern might be able to realize and as to the amount of federal income taxes Texas Eastern might in consequence be required to pay (R. 568-572; Exs. X-15 through X-18, R. 823-826).

relation to the issues in this case.[e] However, it was shown that even this highest estimate compares favorably with Texas Eastern's cost of service for making available large supplies of gas already connected to its system. At Opelousas, Louisiana (where the Rayne gas enters Texas Eatsern's system), Texas Eastern's current gas costs in 1961 were as follows: for gas purchased along the "Wilcox Trend" — 24.0¢ per Mcf; for gas purchased in south Texas — 24.7¢ per Mcf; and for gas purchased from Pemex at the Mexican border — 24.6¢ per Mcf (R. 520-521; and see Map, Ex. X-7, R. 815). Over the lives of the contracts covering Texas Eastern's gas purchases in south Texas and from Pemex, the cost will be 26.1¢ and 25.8¢ per Mcf, respectively (R. 521-522).

Texas Eastern had negotiated for, and considered the purchase of, other large gas reserves in south Texas and offshore Louisiana, but the cost of gas from those reserves at Opelousas would have ranged from 28.02¢ to 31.82¢ per Mcf (R. 523-524).

Gas purchased by other pipeline companies in southern Louisiana would, if delivered to Texas Eastern's system at Opelousas, have involved the following unit costs (R. 525-531):

Gas purchased by	Cost per Mcf at Opelousas
Trunk Line	26.52¢
Southern Natural	24.93¢
United Gas Pipe Line	24.8¢
Texas Gas Transmission	23.95¢
Transcontinental Gas Pipe Line	25.6¢ to 33.3¢
Hope Natural Gas	26.89¢

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e We are not here concerned with any such speculative *cost of service* estimate, but only with Texas Eastern's actual *lease acquisition costs.*

The cost to Texas Eastern of gas produced from its own leases (other than those at Rayne) was 44.34¢ per Mcf according to Texas Eastern's calculations; but FPC Staff personnel "developed a cost of 23.2781 cents per Mcf for company-produced gas" in the field (R. 562-563). Of course, the cost of this gas transported to Opelousas would be substantially higher.

In the light of all the evidence, summarized above, Texas Eastern's unit acquisition cost of 16.57¢ (or 19.44¢) for its Rayne Field gas production clearly represented an exceptional bargain (See: R. 545-546).

3. **Other advantages to Texas Eastern and gas consumers.** Aside from the materially lower cost of the gas Texas Eastern produces at Rayne, the leasehold acquisition yielded many other "singular advantages" (R. 1204) for Texas Eastern — and hence for its customers and their customers, the gas consumers. Among these advantages were the following:

(a) By producing its own gas, Texas Eastern can vary its takes to meet the seasonal and cyclical needs of its system (R. 1193). The greater flexibility thus provided is unavailable under standard gas sale contracts, which contain rigid "take-or-pay-for" clauses; and such flexibility enables Texas Eastern to operate much more efficiently (R. 75-77, 462, 546-547.)

(b) Texas Eastern has a permanent, firm, fixed price for its Rayne gas, rather than a price that will escalate in the future in accordance with automatic and indeterminate price increase clauses found in virtually all standard gas sale contracts (R. 31-33, 77-78, 461).

(c) The purchase of leases, rather than gas, eliminated any possibility of triggering price increases

under "favored nation" and "price redetermination" clauses usually appearing in standard gas sale contracts; and this advantage inured not only to Texas Eastern but to all other pipeline companies purchasing gas in the southern Louisiana area (R. 14-15, 85-86, 462, 545, 1193).[f]

(d) The large size of the Rayne Field and its close proximity to Texas Eastern's trunk line made possible the elimination of heavy gathering and transportation costs, a tie-in of the field with a relatively small investment, and prompt commencement of gas deliveries as soon as the spur line and compressor station could be installed (R. 6, 11, 459-460, 545, 547, 1194).

(e) There were favorable possibilities of finding additional gas reserves underlying the leases acquired by Texas Eastern; and if such additional reserves were discovered, Texas Eastern's unit cost for Rayne Field gas would be reduced still further (R. 459, 548-549, 591).

All of these additional advantages ultimately redound to the benefit of the gas consuming public.

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[f] One of the principal objections to the original (later abandoned) gas sale proposal of the parties had been that it might "trigger" numerous existing contract prices, with a resulting increase in Texas Eastern's gas costs by as much as $10 million annually (R. 16-19, 31, 32, 544).